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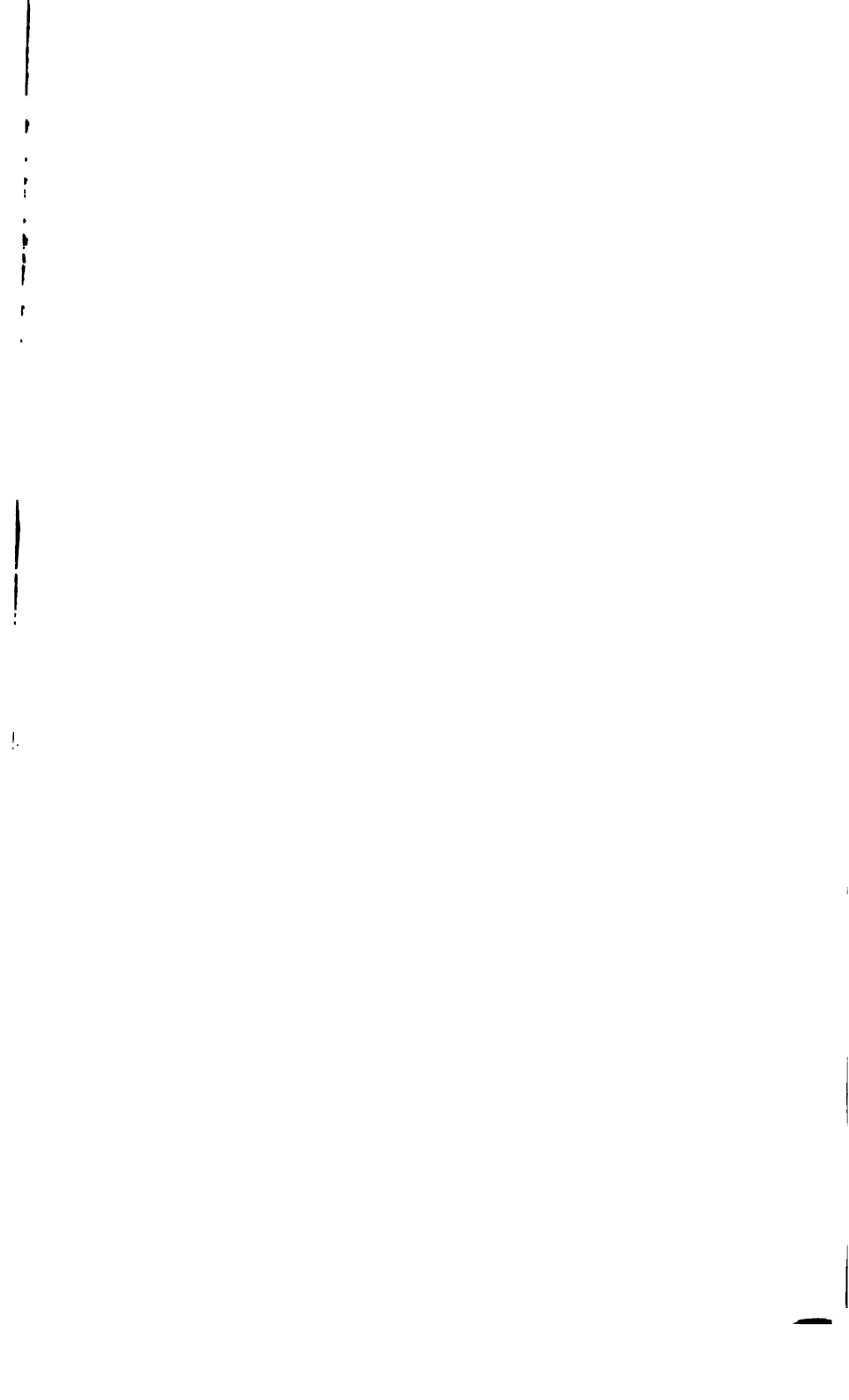
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Thomas Bates
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A

PRACTICAL TREATISE

ON

THE LAW

RELATING TO

THE SPECIFIC PERFORMANCE

OF

Contracts.

Chisholm-Batten, Edmund

BY

EDMUND BATTEN, ESQ.,

BARRISTER-AT-LAW.

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ADVERTISEMENT.

THE Law relating to the Specific Performance of Contracts has not been separately treated of by any legal writer. It has of course occupied a place in works on the general system of Equity Jurisprudence, and one branch of it, that relating to Contracts of Sale, has been dealt with by Sir Edward Sugden; but with the exception of a Treatise by Mr. Newland, published so long ago as 1810, no work exists, any considerable portion of which is devoted to the subject.

The Author has, therefore, considered that a Treatise which should exhibit a connected view of the Principles of the law applicable to this subject, illustrated by the cases in which they have been established by actual decision, would be acceptable to the Profession; and although he cannot hope that the present Work adequately supplies the deficiency, he ventures to trust, that his labours may be found useful to the Student as well as to the Practitioner.

LINCOLN'S INN,
15th December, 1848.



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INTRODUCTION.

It is a principle of natural justice, that a man should perform his agreement. A proper system of Jurisprudence should secure, if possible, the exact fulfilment of the actual contract; if that cannot be obtained, then a sufficient equivalent.

The Common Law of England does not accord in this respect with the rules of natural justice. The party in whose favour an executory agreement is made, is entitled by the Common Law to damages only, in the event of its being unperformed (*a*).

Thus if a man covenant to settle his lands upon his marriage, or to convey them for a valuable consideration; the covenantee, at common law, can only recover damages for the breach of such covenant, and has no remedy there, to enforce the settlement or conveyance of the lands themselves.

But the end of all contracts being the actual accomplishment of the thing stipulated, this measure of damages by no means answered the object proposed, and was an inadequate remedy. Upon this ground a Court of Equity interfered and dealt with the corrupt conscience of the party, when he refused to perform

(*a*) Smith on Contracts, 296; *Harnett v. Yielding*, 2 Sch. & Lef. 586; *Tasker v. Small*, 3 M. & C. 68.

what he had stipulated; and to make the remedy adequate to the mischief, the court directed that to be done which a man in honesty and conscience ought of himself to do: Namely, the estate itself to be settled; or otherwise a performance of what was agreed upon according to the contract (*b*).

The earliest traces of the equitable jurisdiction in directing the performance of agreements is to be found in a case stated in the Year Book of 8 E. 4, 4 B. where it is said by Jenney, "if I promise to build you a house and do not perform my promise you have your subpoena." And Fineux, Chief Justice, in the 21 Hen. 7, speaking upon the different remedies given in the courts for non-performance of contracts, observes, "if a man bargain with another that he shall have his land for £10, and that he will make him an estate therein by such a day, and he do not make the estate, an action upon the case lies, but it is to be observed, *in that* he shall only recover damages; but, by subpoena, the chancellor may compel him to execute the estate or imprison him." So that the jurisdiction of the Court of Chancery in these cases is clearly deducible from about this period (*c*).

Notwithstanding these early instances of an acknowledgment of the jurisdiction of equity in this respect, yet the authority of that Court in decreeing a specific performance of promises, on breach of which a remedy might have been had in damages at common law, was much questioned so late as the 14th of James 1; for in the case of Bromage and Jennings, wherein the

(*b*) Powell on Contracts, Vol. II. p. 3.

(*c*) Fitz. Abr., tit. *Subpœna*, pl. 7. And 21 Hen. 7, 41. Bro. tit. Ac. Ca. 72.

former sued in the Marches of Wales against the latter, for not making a lease according to his bargain, a prohibition was prayed in the King's Bench; because an action upon the case lay at common law. And it was said by Coke, Doderidge, and Houghton, that, without doubt, a Court of Equity ought not to enforce the making the lease; for, if it might, to what purpose was the action on the case or of covenant? And Coke said, that this would subvert the intent of the covenantor, who meant to have an election either to pay damages, or make a lease; whereas this was to compel him to make a lease against his will, and a prohibition was granted (*d*).

But even at that period, Lord Ellesmere, the then Chancellor, laid down that when the law cannot give a lease or a thing promised but damages, there is some cause for the Court to compel the party to perform the thing promised (*e*).

And the law seems to have been settled in favour of the jurisdiction of Courts of Equity, to decree the specific performance of agreements soon afterwards. For in Molineux's case, which arose in the second of Charles the First, such suits were said to be common in Courts of Equity; and the Court of Queen's Bench refused to grant a prohibition against a suit for specific performance in the Court of Requests; because the plaintiff could not sue at common law to assure land, but only to recover damages (*f*).

The jurisdiction is now perfectly settled; and to use the language of Sir William Grant, supposing the

(*d*) Powell on Contracts, Vol. II. p. 5, 6.

(*e*) Tothill, 229.

(*f*) Molineux's case, Latch. 172, see Noy. 88.

contract to have been entered into by a competent party, and to be in the nature and circumstances of it unobjectionable, it is as much of course in Chancery to decree a specific performance as to give damages at law (*g*).

I propose, in the following Treatise, to inquire into the doctrine and practice of Courts of Equity, respecting the specific performance of contracts: and it seems desirable to divide the inquiry into three parts: first, to consider what are the contracts which Courts of Equity will direct to be specifically executed; secondly, in what manner these contracts are enforced by the Courts; and thirdly, what are the general consequences in equity, which follow from the doctrine that these contracts are *thus* to be performed in specie. These three divisions will occupy the three Books of the Treatise.

Contracts, the specific performance of which will be decreed in equity, must be entered into by competent parties: the contracting parties must actually agree, come to one conclusion upon a common subject-matter; their wills must be free and unbiassed, their minds fully informed, and the conclusion must be certain and defined; and all this must be properly proved to the satisfaction of the Court.

A contract implies two parties, each giving something in return for that given by the other: if this reciprocity of consideration does not exist, the transaction is a matter of bounty, with which no system of jurisprudence can effectually interfere. It is a first

principle of equity, that there must be a valuable consideration for the agreement which it is asked to enforce; there must be something proceeding from the one party to render the promise of the other binding in equity.

The consciences of both parties are bound by their agreement to the mutual performance of it. The Courts interfering on behalf of one of these parties to enforce the execution of the agreement by the other, must see that the obligation of the party applying to them, is also fully performed. They cannot insist on the other party fulfilling his part, unless he gets that which he stipulated for. In short, equity requires mutuality of consideration.

Again, the doctrine of Courts of Equity is, that contracts are to be performed in specie, that is the proper mode, according to the principles of equity, of satisfying the obligation laid on the contracting parties by their agreement. Unless therefore equity can secure to each party specifically, that which he intended to get, the object of its interference is not attained; there must be to complete the mutuality of consideration, mutuality of remedy.

The law can never regard as a valid consideration that which is illegal; an illegal consideration is not only no consideration at all, but contracts founded upon it are to be discouraged; and if the agreement be to carry out an illegal object, it is obviously what a Court of Equity cannot attempt to effectuate.

Courts of Equity have only certain defined modes of process, by which they can enforce the performance of agreements, and it often happens that, although the conscience of the party is bound, yet, there is no

means of securing the performance of the obligation in specie; in such cases, the Courts cannot interfere.

We have said that the jurisdiction in equity to perform contracts in specie, was introduced on account of damages at law being an inadequate remedy: but this inadequacy was only the occasion of the interference of these Courts; the ground of their interference was that contracts bind the conscience of the parties to fulfil them: but it is a sufficient answer to a bill for specific performance now, that the damages recoverable at law are an adequate satisfaction for the breach of contract.

Many of the contracts which confer a binding obligation in the eyes of a Court of Equity confer no right to recover damages at law; it is only as regards those contracts upon which there arise rights at law as well as in equity, that the jurisdiction of equity, is, as it is often said to be, discretionary.

Where the double remedy exists, if equity does not interfere, the party still has his legal remedy open; there is no absolute denial of justice in refusing equitable relief; accordingly, equity is very nice and scrupulous in exercising this discretion, where the agreement is hard or unreasonable, or in any way oppressive or injurious.

Lastly, equity will never interfere on behalf of a person whose conduct has not been itself correct; if there has been an attempt at unrighteous dealing on his part, he will get no assistance; the more rigid forms of the legal tribunals may exclude this conduct from their notice, but it will certainly prove a personal bar in a Court of Conscience.

Each of these propositions will occupy our attention

in order in the several chapters of the First Book of this Treatise.

Equity in decreeing a specific performance looks at the real nature of the contract and the substantive object of the contracting parties; and to secure this to them, if the contract has apparently been executed, and yet some essential part of the agreement has not been carried out, the Courts neglect the fact of the apparent execution and compel a specific performance of the actual agreement.

Courts of Equity are satisfied if each party gets substantially that which he intended to get under the agreement, and if this result has been obtained, although not in the form of a specific execution of the agreement, the Courts considering that the obligations arising under the contract are satisfied, will not allow any application to be made to them for a formal performance and will restrain any attempt to recover damages at law for non-performance.

But in determining what is a substantial performance of the agreement, there are certain limits within which Courts of Equity confine themselves; the agreement to be performed is that actually come to by the parties, and these Courts can no more control the express terms of the contract, than a Court of Law.

If a Court of Equity entertains a suit for the specific performance of a contract, it will allow no portion of the relief upon the contract to be obtained at law.

These propositions in their order will form the subject of the chapters of the Second Book.

The jurisdiction of equity to enforce the specific performance of contracts being established, it follows,

that, what is covenanted to be done, ought to be done, and is considered in equity as done. The effect of the contract is in equity produced by the contract itself: an agreement to sell an estate passes the estate; a contract respecting any subject affects the subject itself.

An agreement thus conferring an interest in equity, that interest can be assigned and transferred to a third party, who will be entitled to the same remedies for specific performance as the party under whom he claims.

Notice of the agreement will bind a third party taking the legal right to the property from the person who entered into the agreement.

But the agreement is considered as equivalent to the act agreed to be done, only between the contracting parties themselves, and those who claim under them; it cannot be so considered in relation to third parties.

These propositions will form the subject of the chapters of the Third and last Book.

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BOOK I.

ON THE ESSENTIAL CONDITIONS OF A CONTRACT WHICH
WILL BE SPECIFICALLY ENFORCED BY A COURT OF
EQUITY.

CHAPTER I.

The Contract must be made between competent Parties.

GENERALLY speaking, all parties who are competent to bind themselves at law are competent to enter into agreements which equity will enforce. But there are distinctions between the rules of law and equity on this point.

Generally, an infant is not bound by any agreement, and cannot, therefore, sustain a suit for specific performance of a contract (*a*). But settlements made upon the marriage of infants, under certain circumstances, bind them.

The Statute of Jointures includes infants (*b*); and, in the case of a female infant marrying, it has been

(*a*) *Flight v. Bolland*, 4 Russ. 298; *Conway v. Shrimpton*, 1 B. P. C. 309. (*b*) *Drury v. Drury*, 4 B. C. C. 506 (*n*).

decided, that a jointure of an equitable nature, which if legal, would have barred the wife's dower, shall, if made with the assent of her parent or guardian, bar her in equity: and that if it would not, if legal, have barred her dower, it shall not have that effect in equity (*c*).

An agreement before the marriage of a female infant to give her certain benefits in lieu of dower and thirds, will not bar her claim to the thirds, if her husband die intestate; it only raises an election at her husband's death (*d*).

A settlement of the personal property of a female infant made on her marriage is binding, as being the settlement of the husband, who would otherwise be entitled to the property on the marriage (*e*).

Lord Hardwicke (*f*) and Sir John Leach (*g*) considered, that in this respect there was no distinction between the personal estate of the wife absolutely vested in possession in the husband, and choses en action and reversionary interests which might survive to the wife: but it is now decided, that a settlement upon the marriage of a female infant of her choses en action cannot bind her more than the act of her husband can do so alone (*h*). And in two cases, although the female infants were wards of Court, and settlements had been made under the direction and with the sanction of the Court, yet they were not

(*c*) Carruthers v. Carruthers, 4 B. C. C. 500; Corbet v. Corbet, 1 S. & S. 612, S. C. 5 Russ. 254.

(*d*) Glover v. Bates, 1 Atk. 439.

(*e*) Harvey v. Ashley, 3 Atk. 607; Ainslie v. Medlycott, 9 Ves. 13; Simson v. Jones, 2 R. & M. 365.

(*f*) 3 Atk. 613.

(*g*) Trollope v. Linton, 1 S. & S. 477.

(*h*) Ashton v. Macdougall, 5 Beav. 56; Hastings v. Orde, 11 Sim. 205; Ellison v. Elwin, 13 Sim. 309.

considered binding, the Court being regarded simply as a trustee (*i*).

A female infant cannot be bound by a settlement made on her infancy as to her landed property (*j*).

Of course infants attaining twenty-one are bound by their own consent; and very great care need be taken that in relying on the inefficiency of a contract by an infant, this point is not overlooked. A male infant acquiescing in the settlement after twenty-one, or a female infant acquiescing in it after twenty-one and the death of her husband, is bound by it (*k*).

Other circumstances connected with the law of husband and wife have made contracts by infants apparently binding on them, when in fact, the decision does not go at all upon that ground. Thus, in *Durnford v. Lane* (*l*) a female infant married an adult, and upon the marriage, articles were entered into for the settlement of the estate by fine after the wife attained twenty-one, to uses for the benefit of the wife and children. Instead of this, after her attaining twenty-one, the fine was levied to uses to enable the husband to borrow money; the mortgagees had notice. Lord Thurlow held that the settlement could not be avoided during the marriage; that the husband and those taking under him with notice were bound in conscience to give effect to the uses of the settlement; that the assent of the wife could make no difference; that the wife's intention, as manifested by the fine, was

(*i*) *Simson v. Jones*, and *Hastings v. Orde*, *ubi supra*.

(*j*) *Lucy v. Moor*, 3 B.P. C. 514; *M. R.* in *Clough v. Clough*, 5 Ves. 717; *Stamper v. Barker*, 5 Madd. 157; *Lecky v. Knox*, 1 Ball &

Beatty, 210; *Milner v. Lord Harewood*, 18 Ves. 259.

(*k*) *Jarman's Bythewood*, 9 vol. 35; Lord Thurlow, in 1 B. C. C. 116.

(*l*) 1 B. C. C. 106.

to give the estate to the husband. This case and others of the same class (*m*) decide, that though in the case of marriage articles executed by the wife while under age she is not bound, still the husband cannot join with the wife, when she comes of age, in varying the articles (*n*).

So again in *Slocombe v. Glubb*, a male infant married an adult; and she contracted that her estate should be settled in a particular manner. Lord Thurlow compelled the husband, when of age, to give effect to the settlement. He said, "if a woman before marriage conveys her property and agrees to settle her general expectations, when they shall fall in, and this be done without any fraud upon the intended husband, such an agreement must be executed, and the husband, when of age, must answer her contract" (*o*).

It seems that infancy on the part of the husband at the time of the marriage is no bar to a claim upon him after he becomes of age, on account of any liability his wife had incurred before marriage.

It was formerly considered that infants are to be bound by contracts, if for their benefit, but this doctrine cannot now be supported. The two cases generally cited to establish the doctrine are, the *Bishop of Bath and Wells v. Hippisley* (*p*), which was the case of an infant being bound by an award made upon a reference upon his guardian's and his own consent; but this was only an agreement respecting the profits of

(*m*) *Medcalf v. Ives*, 1 Atk. 64.

(*o*) 2 B. C. C. 545.

(*n*) Per Sir E. Sugden, C. I.;
Blackwood v. Borrowes, 4 D. & W.

(*p*) Cited by Lord Hardwicke,
3 Atk. 614.

the infant's property, during minority, which it was competent for the guardian alone to make; and *Hollingshead v. Hollingshead* (*q*), which was a covenant by an infant and his mother to settle land on marriage of a certain yearly value, he having a power to settle the same by way of jointure. But Lord Alvanley, M.R., examined the Register's Book for this case, and said "I am extremely reluctant to lay it down that in the case of an infant, the mother could covenant for him further than he could for himself, I therefore sought to see whether he had done any act after he was of age to confirm it, and I cannot but believe he did so" (*r*). The Courts, indeed, regard with favour an agreement made by a guardian, which is beneficial to the infant, and in *Brummell v. Clavering*, an agreement being made by a parent, tenant for life, who died appointing testamentary guardians for his child, the Court restrained the guardians from using the settlement in ejectment during the minority (*s*).

Unless the case of election exists, when the Court may elect which course is for the infant's benefit (*t*), the Court has no jurisdiction to alter the property of an infant, so as to bind the legal estate, on the notion of its being beneficial to the infant (*u*).

It is decided that the Court cannot by its order, directing a sale, make a good title to the purchaser, the Court having power to bind the equitable estate only (*v*).

(*q*) Cited, 2 P. Wms. 229.

(*r*) In *Jackson v. Jackson*, 4 B. C. C. 466; see *Capes v. Hutton*, 2 Russ. 357.

(*s*) 3 Swanst. 690.

(*t*) *Chetwynd v. Fleetwood*, 4 B. P. C. 435.

(*u*) *Simson v. Jones*, 2 R. & M. 365; *Hastings v. Orde*, 11 Sim. 205.

(*v*) *Calvert v. Godfrey*, 6 Beav. 97; *Peto v. Gardner*, 2 Y. & C. C. 312; *Garmstone v. Gaunt*, 1 Coll. 577.

But if there are parties before the Court who could convey the legal estate, as trustees is in the case of realty, or the executor in the case of personalty, then the decree of the Court will bind the equities; and if beneficial to the infant, and made with due provisions for preventing the interests of third parties from being affected, the Court will direct conversion of the property of infants (*w*).

Of course a lunatic cannot enter into a contract; but in *ex parte* Tabbert, Lord Eldon established an agreement by the committee of a lunatic's estate, the lunatic being tenant for life without impeachment of waste, that the owner of the adjoining land should work the coal under the lunatic's estate, the agreement being reported by the Master to be for the benefit of the lunatic (*x*).

An agreement by a married woman is, generally speaking, quite ineffectual to bind her, or those claiming under her (*y*).

At law some few exceptions occur, such as where the husband is civilly dead, and where particular customs give a capacity of contracting to married women (*z*).

In Equity a married woman is allowed to have a separate estate; but the question, whether she, having separate property, can be bound by a general or special agreement, is one of considerable nicety.

(*w*) Lord Winchelsea *v.* Norcliffe, 1 Vern. 435; Inwood *v.* Twyne, Amb. 417; *ex parte* Bromfield, 1 Ves. jun. 453; 3 Bro. C. C. 510; Ashburton *v.* Ashburton, 6 Ves. 6; Webb *v.* Lord Shaftesbury, 6 Madd. 100; Ware *v.* Polhill, 11 Ves. 279; *ex parte* Phillip, 19 Ves. 119.

(*x*) 6 Ves. 429.

(*y*) As to contract by husband and wife relating to her estate, see Humphreys *v.* Hollis, Jac. 73; and observations of the V. C. Knight Bruce in Salisbury *v.* Hatcher, 2 Y. & C. C. C. 54. See p. 62.

(*z*) See also in Equity, 2 Vern. 104, 3 P. Wms. 39; Castleton *v.* Fitzwilliams, Cary, 144.

The doctrine of Lord Thurlow, in *Hulme v. Tenant*, seems the most sound: that "if a Court of Equity says a *feme covert* may have a separate estate, the Court will bind her to the whole extent, as to making that estate liable to her own engagements; as, for instance, for payment of debts, &c." (a). At the same time the decision in *Hulme v. Tenant* was only that the personal estate, and rents and profits of the real estate, could be affected, the Chancellor holding that "determined cases went thus far, that the general engagement of the wife shall operate upon her personal property, and shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply the personal estate and the rents and profits of the real estate as they arise, to the satisfaction of such general engagement."

In *Aylett v. Ashton* (b), Lord Cottenham, then M.R., dismissed a bill for specific performance of an agreement entered into by a married woman for the sale of property, one-fourth of which was settled, but it did not appear how, to her separate use; the ground of the decree was, that an attempt was made to charge a married woman personally, the trustees of the separate property not being parties. But in his judgment his Lordship said, "Although a *feme covert* has power, and the Court has jurisdiction over the rents and profits of her separate property, no case has given effect to her contracts against the *corpus* of her separate estate." Now in *Sturgis v. Corp* (c) there was a reversionary interest given to a married woman, but to her separate

(a) 1 Bro. C. C. 16.

(b) 1 M. & C. 105.

(c) 13, s. 190.

use, Sir W. Grant, M.R., held that it could be assigned by her, and that without examination, saying, "If the principle is, that she is as to that property a *feme sole*, and has a disposing power, she has as much a disposing power over her reversionary interest as over her interest in possession." And Sir Edward Sugden, C. I. (*d*), said, no doubt if a property were limited to the separate use of the lady, she might dispose of it, and her power might be executed, although the property is reversionary. And Lord Cottenham, in *Owens v. Dickenson* (*e*), approved of Lord Thurlow's doctrine, and said, that if a married woman has a power to deal with her separate property, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it.

The true distinction seems to be that pointed out by Sir W. Grant, M. R., in the case of *Heatley v. Thomas* (*f*): that the question is, whether the property was separate property to all intents and purposes; because it seems clear, that to the extent to which it is separate property, the Court will give effect to the contracts of the owner; if she has only a power over it by will, it will be impossible to bind it; but it seems that if she has a power over it by deed, and agrees to exercise that power, or if it is settled generally to her own use after the determination of the coverture, she can alienate it as if she were a *feme sole*. This is the true doctrine of *Hulme v. Tenant* (*g*), which, it was remarked by Lord Brougham (*h*), "Lord Eldon re-

(*d*) *Batt v. Cuthbertson*, 4 D. & W. 396; *Major v. Lansley*, 2 R. & M. 355; *Stearns v. Nelson*, 2 Beav. 245.

(*e*) Cr. & Ph. 48.

(*f*) 15 Ves. 596.

(*g*) 1 Bro. C. C. 16.

(*h*) In *Murray v. Barlee*, 3 M. & K. 223.

peatedly expressed his doubts about; but it has been constantly acted upon by other Judges, and never in decision departed from by himself."

In *Greatley v. Noble* (*i*) it was urged, that in no case has a demand against a married woman, arising out of a fraud, been decreed to be satisfied out of her separate estate. Sir John Leach, V. C., said, "If it were necessary now to decide the point, I think it would be difficult to find either principle or authority for reaching the separate estate of a *feme covert* as if she were a *feme sole*; without any charge on her part either express or to be implied." And in *Stuart v. Lady Kirkwall* (*j*), the same Judge said, alluding to this case, that he had expressed his opinion, that the separate estate of a *feme covert* was not liable to answer general demands upon her. In *Aguilar v. Aguilar*, following the decisions of the Duke of Bolton *v. Williams*, and *Jones v. Harris*, (*k*) he decided that no claim could be made against a married woman, on account of an implied assumpsit, for being incapable of contract or general engagement, this Court could not fasten upon her separate property those equities which arise out of contract and general engagement.

Now Sir John Leach, in his anxiety to exclude the case of implied engagements, goes beyond the decisions of the other Judges; because the doctrine of Lord Thurlow and Lord Cottenham is, that a *feme covert* having a separate estate, is capable to the extent of that estate of entering into contracts, and binding that

(*i*) 3 Maddock, 79.
(*j*) 3 Maddock, 387.

(*k*) 5 Maddock, 414, 2 Ves. jun. 138, 9 Ves. 486.

property by a general engagement: and accordingly, in *Dowling v. Maguire* (l), a married woman, contracting by letter to pay £1,500 for the next presentation to a living, was held entitled to file a bill for specific performance, she being liable to make her contract good out of her separate property.

But it is quite settled there can be no implied assumpsit raised against a *feme covert* (m), that is, to use the language of Sir F. Pollock, C. B., the law saying she contracted because she ought to have contracted (n). It does not appear from *Chester v. Platt*, where Sir John Leach held a *feme covert* not liable upon a contract for the purchase of an estate, whether she had signed the contract or not; if she did sign it, the decision is not according to the received doctrine; but if she did not sign it, those acts of part performance which, in the case of a *feme sole*, would have been considered as implying a contract, and as therefore binding, were properly held not to bind a *feme covert* (o).

In a late case Sir E. Sugden, C. I., said, "I hope that the Court may feel itself at liberty to treat a woman entitled for her separate use in possession, as *sui juris*, so as to bind her interest where she prevails upon her trustee to commit a breach of trust. But this could only be where the wife really acted for herself" (p).

In *Power v. Sheil* it was held, that an agreement by

(l) LL. & Goold. t. Plunkett, 1.

(m) *Murray v. Barlee*, 4 Sim. 82.

(n) *Gore v. Gibson*, 13 M. & W. 623.

(o) *Chester v. Platt*, Rolls, 1829,

Sugden, V. & P. 232.

(p) *Mara v. Manning*, 2 Jones & Lat. 318; see *Ryder v. Bickerton*, 3 Swan. 80 (n); *Cocker v. Quayle*, 2 R. & M. 595.

an adult female, before marriage, to take a covenant in bar of dower, would not bind her unless the representative of the husband satisfied the covenant, and there being no assets, her claim to dower was not barred. Sir A. Hart, C. I., said, if an adult female before marriage contracts that she will not claim dower, a Court of Equity will not enforce that contract. Lord Alvanley's observation in *Carruthers v. Carruthers* (q) was referred to, when that Judge said, "I do not say, that if she had been adult, she might not have bound herself: she might have taken a provision out of the personal estate, or she might have even taken a chance in satisfaction for her dower, acting with her eyes open, but an infant is not bound by a precarious interest." But the Lord Chancellor observed, this would be a new equity. "I know no jurisdiction which a Court of Equity has to say, you may do that, which the law says you shall not do. The law says, the intended wife shall not by contract bar her dower, except certain requisites are complied with; equity may dispense with the form of those requisites, but not with the substantial matter they all tend to, that is a solid provision for the wife, such as was agreed on by the contracting parties." If this decision is correct, it must be considered as overruling the opinion of Sir J. Leach, in *Simpson v. Gutteridge* (r), who there approves of Lord Alvanley's opinion, and disallowed an objection to a title on the ground that the validity of the provision for the wife in bar of dower was not proved. But Sir A. Hart's views seem to agree with the decision of Lord Thurlow, in *Tew v. Lord Win-*

(q) 4 B. C. C. 513.

(r) 1 Madd. 609.

terton (*s*), where a woman having previously to her marriage accepted a bond for an annuity out of the real and personal estate of her husband, and agreed that it should be in bar of dower, yet, the assets proving insufficient, she was allowed to go against the estates of which her husband was tenant in tail, and of which she was dowable. But the objection which this doctrine would raise to many titles, does not seem to have been considered of importance by conveyancers (*t*).

It may be observed, that whilst equity permits married women to transact as to their separate property, it expects all such transactions to be perfectly fair and open (*u*).

A Court of Equity, whose peculiar province it is to prevent fraud, will never allow its rules to be the means of effecting fraud. "If an infant is old and cunning enough," said Lord Cowper, "to contrive and carry on a fraud, he ought to make satisfaction for it" (*v*); and the same holds in the case of a *feme covert*. Infancy or coverture shall be no excuse in the case of fraud (*w*). Lord Mansfield, in *Zouch v. Parsons*, said, "in one word, the privilege of infants is to be used as a shield, not a sword; it never is to be the cover of fraud" (*x*): thus, if the elder son promise his father to give the younger £100, if the father will desist from making a settlement which he intended on the younger son, by which means the father desists

(*s*) 3 B. C. C. 489. The report in 1 Ves. jun. 451, is inaccurate.

(*t*) *Power v. Sheil*, 1 Moll. 896; see S. C. 1 Beatty, 48.

(*u*) Per Sir W. Grant, M.R.; *Dalbiac v. Dalbiac*, 16 Ves. 125.

(*v*) *Watts v. Cresswell*, 9 Vin. Abr. tit. *Enfant*, n. pl. 24, p. 415.

(*w*) *Cory v. Gertcken*, 2 Madd. 40; see 3 Hare, 505.

(*x*) 3 Burr. 1794.

from the settlement, though the eldest son was an infant, he shall be compelled to pay the £100 (*y*). So Lord Thurlow said, "if there was a fraud of which the infant was cognizant, she would be bound as much as an adult" (*z*).

Eleemosynary and ecclesiastical corporations are not bound by any thing in the shape of an agreement regarding their lands, unless it is evidenced by a deed or writing with their corporate seal affixed to it (*a*). A corporation is a body politic owing its existence to the law, and only able to speak or act through the medium which the law gives it. All corporate acts indeed need not be evidenced by the common seal, but the rule is stringent as to agreements concerning land (*b*).

In *Taylor v. Dulwich Hospital*, Lord Chancellor Parker says, "as to the signing of private persons, namely, the master, warden, and fellows, that cannot be such a contract as binds the college; for a contract to bind that (or indeed any corporation as to its revenue) must be under its common seal. It is true there would have been some equity if the intestate had, after this order for a new lease at the old rent, laid out money in improving or building on the premises in confidence and reliance on such order." So far the doctrine has met with the approbation of succeeding Judges, but his Lordship's concluding obser-

(*y*) 2 Com. Dig. Chan. 3 R. 5.

(*z*) 1 Bro. C. C. 358.

(*a*) Per Sir L. Shadwell, V. C. E. in *Carter v. the Dean of Ely*, 7 Sim. 227.

(*b*) See *Mayor of Ludlow v.*

Charlton, 6 M. & W. 821; *Slark v. the Highgate Archway Co.* 5 Taunt. 792; *Beverley v. Lincoln Gas Light and Coke Co.* 6 Ad. & Ell. 329; *Arnold v. the Mayor of Poole*, 5 Scott N. R. 741.

vations, although agreeable to the old rule (*c*), hardly state the law now. "However, even in that case, he should have had his reparation only from the private persons signing the order, not against the college" (*d*).

The equity of the case would seem to be, that the corporation having received the benefit of the expenditure, should do that upon the hope of which being done the money was laid out, and this is the doctrine of later decisions. This is the ground upon which equity considers that the part performance of contracts, excepts them from the operation of the Statute of Frauds, and it is completely recognised by Lord Cottenham, in the *London and Birmingham Railway Company v. Winter* (*e*). There an agreement had been entered into between the agent of the defendant and an agent of the Company for the sale of land for the purpose of the railway of which the company had taken possession. It was contended, on behalf of the defendant, that a corporation could only bind itself by its corporate seal, and that there was no evidence that Cooke was so appointed agent of the company, and that the contract was not binding on it. His Lordship said, "it is not very easy to reconcile all the cases on the subject: but the case of the *Mayor of Stafford v. Till* (*f*) is very similar to the present, as to the circumstances of the parties to the contract. There the Court of Common Pleas thought that the corporation was entitled to support an assumpsit for use and occu-

(*c*) *Strange v. Beynbridge*, 21
Eliz. Cary, 146.
(*d*) 1 P. Wms. 655.

(*e*) Cr. & Ph. 57.
(*f*) 4 Bing. 283.

pation against a tenant, who though he did not hold of them by deed, had had actual enjoyment of their land; so here the plaintiffs have not only been acting on the contract by entering into possession of the property, but have actually destroyed the property enjoyed by the defendant previously to the contract, by making their railway over it. If, therefore, it were necessary for the defendant to file a bill against these plaintiffs, I have no doubt but that they would be compelled, specifically, to perform the contract." The dictum of Sir John Leach, in *Marshall v. Corporation of Queenborough* (*g*), is to the same effect, that if a regular corporate resolution passed, for granting an interest in a part of the corporate property, and upon the faith of that resolution, expenditure was incurred, he was inclined to think that both principle and authority would be found for compelling the corporation to make a legal warrant in pursuance of that resolution (*h*). The case of *Maxwell v. Dulwich College* (*i*) seemed, as originally reported, to have been an authority for the notion, that a resolution entered in the books of a corporation, and signed by a majority of the body, is binding on them; but, as stated by the Vice Chancellor, in his judgment in the case of *Carter v. Bishop of Ely* (*j*), it only amounts to an authority for the proposition for which we are now contending: a pro-

(*g*) 1 Sim. & Stu. 522.

(*h*) Lord Denman, C. J., in *Paine v. the Guardians of the Poor of the Strand Union*, said, "there is another distinction which has not been adverted to; where a corporation help themselves to articles. Suppose the guardians chose to go

and hold meetings at the house of a person, are they not compellable to pay for it?" 10 Jur. 309. See *Hall v. Mayor of Swansea*, 5 Q. B. 526.

(*i*) Treat. Eq. book 1, ch. 4, sec. 21, note.

(*j*) 7 Sim. 222.

position which can hardly be disputed upon principle, and a current of authorities from Lord Hardwicke (*k*) to the present time (*l*).

A question of considerable importance bearing upon this subject was decided in *Edwards v. the Grand Junction Railway* (*m*). The promoters of this railway had agreed with certain turnpike trustees, that on condition of the trustees offering no opposition in Parliament and consenting to forego the insertion of certain clauses in the Act, a formal instrument to the effect of the clauses should be executed under the seal of the company when incorporated. The bill passed, but upon the company proceeding to execute works contrary to the stipulation, an application was made to the Court to enforce the agreement. The judgment of Lord Cottenham, C., is clear and decisive. "The railway company contend that they being now a corporation are not bound by anything which may have passed, or by any contract which may have been entered into by the projectors of the company, before their actual incorporation. If this proposition could be supported, it would be of extensive consequence at this time when so much property becomes every year subjected to the power of the many incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said that the company cannot be sued upon their contract, and that Moss entered into a contract, in his

(*k*) *Winne v. Bampton*, 3 Atk. 478. *Coventry*, 1 Y. & C. 523.
(*m*) 1 M. & C. 650.

(*l*) *Wilmot v. Corporation of*

own name, to get the company when incorporated to enter into the proposed contract. It cannot be denied, however, that the act of Moss was the act of the projectors of the railway; it is therefore the agreement of the parties who were seeking an act of incorporation that, when incorporated, certain things should be done by them. But the question is, not whether there be any binding contract at law, but whether this Court will permit the company to use their powers under the act, in direct opposition to the arrangement made with the trustees prior to the act, upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this Court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered: they cannot exercise the powers given by Parliament to such projectors in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld. The case of the East London Water Works Company v.

Bailey (*n*) was cited to prove that, save in certain cases, the agent of a corporation must, in order to bind the corporation, be authorized by a power of attorney, but it does not therefore follow that corporations are not to be affected by equities, whether created by contract or otherwise affecting those to whose position they succeed, and affecting rights and property over which they claim to exercise control."

A notion at one time appears to have prevailed that an agreement might be made with a parish by making it with the parishioners assembled in vestry; and an order in vestry was considered as binding upon the parish, and rates have been directed by the Court in pursuance of obligations entered into by the vestry (*o*), but a contrary doctrine has prevailed for some time and is now established. A bill filed by a former churchwarden against the parish officers and forty inhabitants, to be reimbursed money laid out under an order of vestry, and ordered to be paid at another vestry was characterized by Lord Rosslyn as a most pernicious and absurd attempt to make a parish reimburse a parish officer, and was dismissed (*p*). Sir Wm. Grant said that a retrospective account could not be decreed against a parish: that the present parish officers cannot be compelled to pay for the breach of trust of their predecessors; that a parish is a fluctuating body and not at all similar to a corporation (*q*). The fact is that the legality of a rate for

(*n*) 4 Bing. 283.

(*o*) See cases in 1 J. & W. 73, n.

(*p*) French v. Dear, 5 Ves. 547.

(*q*) *Ex parte Fowler*, 1 J. & W. 70.

reimbursement of churchwardens and overseers had hardly been doubted until the case of the *King v. The Chapelwardens of Haworth* (*r*), when Lord Ellenborough held that the regular way is for the churchwardens to raise the money beforehand by a rate made in a regular form for the repairs of the church, in order that the money may be paid by the existing inhabitants at the time, on whom the burthen ought properly to fall. Equity must follow the law, and as an order of vestry that repairs should be made, without a previous rate, is illegal, it cannot bind the parish; at the most, there would be an equity against the persons making the order in vestry (*s*). Accordingly, it being agreed at a vestry that a bond should be given by the parish officers to a tradesman for repairs, that he should give the parish twelve months' notice when he required payment, and that the parish should be at liberty to pay the debt by instalments, and it being agreed also at another vestry that the parish officers should be indemnified out of the rates, and interest having been paid for twenty-five years out of the rates, the Court dismissed a bill filed by one of the obligors to restrain an action brought by the executrix of the obligee for the amount, and said that the parishioners having no power to bind the parish, the liability of the obligors remained unaffected (*t*). In the case of *Jones v. the Parishes of Montgomery*, there being a local act, the Court construed that act to give power to creditors advancing

(*r*) 12 East, 556.

(*s*) *Lanchester v. Thompson*, 5 Madd. 4.

(*t*) *Jaquet v. Lewis*, 8 Sim. 480.

There are some difficulties, however, in conceding that the plaintiff had no right to any of the relief claimed by this bill.

money to the guardians of the poor to compel the assessment of rates to pay the principal and interest of their debts (*u*), but this case stands upon its own peculiar circumstances.

Aliens are incapable of holding lands, and felons convict of holding any property for their own benefit. The Court will refuse to let an alien have property which he cannot hold (*v*), and Lord Alvanley said, the Court would not execute an agreement to grant a lease to a man who had committed felony (*w*).

The Crown, its officers and servants, are not subject to the jurisdiction of Courts of Law or Equity in respect of contracts. An agent of the government making contracts on behalf of the public, is not liable to be sued on account of those contracts at law (*x*), and the same rule obtains in equity. When an accountant to the Crown, having an annuity from government for life, had assigned the annuity to secure money, and afterwards absconded largely indebted to the Crown, an order in council was made, revoking the grant of the annuity and directing a portion remaining unpaid to be applicable to the liquidation of the debt to the public. The assignee of the annuity filed a bill against the Treasurer of the Navy, by whom the annuity was made payable, praying an account of the arrears of pension and to restrain the Treasurer of the Navy from paying away any of the monies coming to his hand. The Attorney General was also made a party. It was submitted on the part of the Attorney

(*u*) 3 Swanston, 203.
 (*v*) ——— *v. Davies*, 19 Ves. 81;
Roberts v. Walker, 1 Russ. & Myl.
 752, Sug. V. & P. 883; Sir L.
 Shadwell, V. C. E., in *Burney v.*

Macdonald, 15 Sim. 6. See p. 14.
 (*w*) *Willingham v. Joyce*, 3 Ves.
 168.
 (*x*) *Unwin v. Wolseley*, 1 T. R.
 174.

General and the Treasurer of the Navy, that the Court had no jurisdiction. The bill was dismissed as against them. Sir Wm. Grant said, "where a public officer has in his hands money issued by the government for the use of an individual, it is clear that a suit may be maintained against the officer for the recovery of such money. For it is his duty towards the Crown, as well as towards the individual, to apply the money to its destined purpose. But here the officer is commanded by government to withhold the money from Mr. Hunt (the grantee), and to apply it towards satisfaction of a debt which Mr. Hunt owes the public. Then the question is between Government and Mr. Hunt, or Mr. Hunt's assignee; and it is not, I apprehend, in this Court that such a question can be decided" (y).

In *Williams v. Steward*, a bill was filed against the Commissioners of land tax for the specific performance of a contract, alleged to be entered into between the commissioners and the plaintiff, for the sale of the land tax charged on certain premises, to him. Among other objections to the bill the commissioners urged, that the Court could not entertain such a suit against them, they being officers of the Crown. The Lord Chancellor allowed a demurrer, saying, that the commissioners were merely the servants of the Crown for the purposes of the act, they neither have, nor can assume to themselves any personal responsibility, and therefore, what they may be called upon to do, they cannot be called upon to do in this Court by

virtue of any authority with which this Court is invested (*z*).

In *Oldham v. the Lords of the Treasury*, the King being entitled to receive a certain sum out of the Consolidated Fund in respect of the civil list, granted a pension to a party who assigned it. The pension was afterwards revoked, and a new one was granted in lieu of it; and the assignee filed a bill against the Lords of the Treasury to compel them to pay the new pension to him. The Court held they had no jurisdiction, and that the King himself must be sued by petition of right, if this money was to be got at (*a*). But, in a case where compensation was directed by act of Parliament to be given to the holder of offices which were abolished, and the Lords of the Treasury had fixed the amount of compensation, but had directed it to be paid to two only of the persons interested in it; the Vice Chancellor overruled a demurrer to a bill brought by a person interested in the profits of the office to restrain the Lords of the Treasury from paying the compensation money to those persons to whom they had directed it to be paid, saying, that it was only to restrain them from doing a mere ministerial act with a view to secure the money for the parties who may be decreed to be entitled to it (*b*). The bill however prayed not only to restrain the Lords of the Treasury from paying over the compensation money for the future, but also, after alleging that they had paid £2400 to certain parties, that an account might be taken of the *arrears* and growing payments of the

(*z*) 3 Mer. 472.

(*a*) See 6 Sim. 220.

(*b*) *Ellis v. Earl Grey*, 6 Sim. 214.

compensation money, and that the defendants, the Lords of the Treasury, might be decreed to pay the same and the arrears and growing payments thereof into Court. It may fairly be doubted whether the Court had jurisdiction to order the payment again of the arrears which had been in fact paid, for the Lords of the Treasury had no fund out of which they could make such payments.

An agreement by the agent of a party is of course equivalent to that of the party himself, if he be authorized to enter into the agreement.

An agent authorized to sell by auction cannot sell by private contract (*c*). Lord Eldon said, "that a decree for specific performance could not be obtained without admission or proof that the agent was lawfully authorized; if it is established that the agent had not authority to bind, though he honestly believed he had it, the ground for decreeing a specific performance fails" (*d*).

The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say, a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of his (*e*).

An auctioneer, at a sale by auction, is held to be an agent duly authorized by both seller and buyer within

(*c*) *Daniel v. Adams*, Amb. 295.

(*d*) *Howard v. Braithwaite*, 1 V. & B. 202, see p. 208; see also *Blore v. Sutton*, 3 Mer. 245; and

Kemeys v. Proctor, 3 V. & B. 58.

(*e*) Per Sir W. Grant, M. R., see *Fairlie v. Hastings*, 10 Ves. 123.

the Statute of Frauds (*f*). It was with difficulty that this point was established (*g*); but the nature of the proceeding by auction—the bidding for the purpose of making the purchase—the necessity of making a statement of the bidding—the direction to the auctioneer to write down the bidding, afford intelligible grounds for the decision (*h*).

But a memorandum of the terms of a marriage settlement written by a solicitor, and containing the names of the contracting parties, will not be considered as written by an agent having authority to bind either party (*i*).

Notwithstanding the reference is made under an order of Court, the authority of the arbitrator may, at any time before the award is made, be revoked by either of the parties, and the arbitrator has, after such revocation, no power to make any award (*j*).

In a late case before the House of Lords (*k*), it was held that any secret instruction, limiting a general authority in writing given to an agent, and which was produced by him to the parties with whom he was contracting, did not form a ground for the Court's interference to prevent an award being made in conformity with an agreement made by the agent. Lord Cottenham said, "thus, then, there is an agreement, entered into by an agent having in his hand a written

(*f*) *Kemeys v. Proctor*, 1 J. & W. 351; *Emmerson v. Heelis*, 2 Taunt. 38.

(*g*) *Stansfield v. Johnson*, 1 Esp. 101; *Walker v. Constable*, 2 Esp. 650, and 1 Bos. & Pull. 306.

(*h*) Per Lord Langdale, M. R., 1 Keen, 769. See p. 788.

(*i*) *Earl of Glengal v. Barnard*, 1 Keen, 769.

(*j*) Per Sir J. Leach, V. C., *Haggett v. Welsh*, 1 Sim. 134; see *Skee v. Coxon*, 10 B. & C. 483.

(*k*) *Duke of Beaufort v. Neeld*, 12 Cl. & Fin. 248.

authority from the principal, in terms clearly justifying the contract into which he was entering. If the principal be entitled to the assistance of a Court of Equity to be relieved against a contract so entered into, upon the ground that he had previously instructed his agent not to enter into a contract, except under circumstances which did not occur, and to which no reference appeared upon the face of the authority, then the ground upon which the order was made fails. But I hold it to be quite clear that the principal has no such equity. In *Martyn v. Kingsley* (*l*), a scrivener, who had been intrusted with the custody of a bond, received the money and delivered up the bond, and it was held that the obligee was barred. In *Hamilton v. Lord Clanrickarde* (*m*), a lease executed by an agent under a general power of attorney, was held to bind the principal, although the land comprised in the lease was not what the power of attorney was intended to apply to." Of the propriety of this decision there can be no doubt. It is a different question, whether a Court of Equity will, in such a case, specifically enforce an agreement so entered into. Lord Brougham seemed to think it would not; at least, he said, "I am not going to discuss whether it is possible, though I have a very strong opinion that it is not possible, for an agent to sell a man's estate, or to sell a man's lands, when there is no authority given to him to do so (*n*)."

In *Elworthy v. Bird*, the Court having recommended an accommodation of an action for an assault, and the

(*l*) *Proc. in Ch.* 209; see also
Sharpe v. Thomas, *Colles P. C.* 224.

(*n*) *Duke of Beaufort v. Neeld*,
12 Cl. & Fin. 248.

(*m*) *5 Bro. P. C.* 247.

counsel for the parties having signed an agreement for that object, upon a bill for specific performance, it was decided, that the defendant must disprove that his counsel had authority to sign the agreement, and that, in the absence of evidence to the contrary, the Court will presume that he had such authority, and, therefore, a performance was decreed (n).

(n) 1 Tam. 40.

CHAPTER II.

The Contract must be entered into willingly.

THE party who enters into the agreement must do so willingly, and not be biassed or influenced unduly in the matter.

A compromise entered into with a man in gaol, said Lord Thurlow, ought not to stand (*a*). If an agreement be compelled by threats, it shall not bind (*b*). A forced agreement of the party is counted to be no agreement, and, therefore, the Court will not compel him that did thus agree to perform his agreement, for the law abhors all force and violence (*c*). In cases of intoxication, although the party may not have been drawn in to drink by the plaintiff, yet, if the agreement was made in a state of intoxication, the Court will not decree a specific performance (*d*).

This does not merely depend on the want of will on the part of the man who is thus under some extraneous influence, but also upon the fact, that it is, what a Court of Equity calls fraud, for another party to take advantage of these circumstances. Lord Hardwicke says, "Another kind of fraud is that which may be presumed from the circumstance and conditions of

(*a*) *Wilkinson v. Stafford*, 1 Ves. jun. 43.

(*b*) *Plowden v. Marsham*, 3 Car. Toth. 67.

(*c*) *Viner's Abridg. Contract*, 5, 506.

(*d*) *Malins v. Freeman*, 2 Keen, 34, per Lord Langdale, M. R.

the parties contracting; and this goes farther than the rule of law, which is, that it must be proved and not presumed, but it is wisely established in equity to prevent surreptitious advantage of the weakness or necessity of another, which, knowingly to do, is equally against conscience as to take advantage of his ignorance" (*e*).

At law, where the drunkenness is so complete that a man is incapable of knowing what he is about, at least if the other party knew him to be in that state, the party contracting is not liable upon the contract (*f*).

If the relation between the parties be one of influence on the one hand and of dependence on the other, generally speaking a gift obtained from the party under influence will be set aside (*g*); and it will be for the party having that influence, and obtaining an agreement, whether such agreement be executed or not, to prove that the agreement was reasonable and proper; if for a sale, that the price was adequate (*h*), and this rule applies also to cases where it is not the relation of the two contracting parties, but merely the circumstances of the party from whom the agreement is obtained, which make it fraudulent to take advantage of those circumstances, as in the case of persons

(*e*) 2 Ves. sen. 154.

(*f*) *Gore v. Gibson*, 13 M. & W. 623, per Parke, B.; *Cooke v. Clayworth*, 18 Ves. 12.

(*g*) *Huguenin v. Baseley*, 14 Ves. 273; *Dent v. Bennett*, 4 M. & C. 269; *Lord Selsey v. Rhodes*, 2 S. & S. 41; *Priestly v. Wilkinson*, 1 Ves. jun. 214; *Hunter v. Atkins*, 3 M. & K. 113; *Downes v. Grazebrook*,

3 Mer. 200; *Edwards v. Meyrick*, 2 Hare, 61; *Casborne v. Basham*, 2 Beav. 80; *Hatch v. Hatch*, 9 Ves. 296; *Ex parte James*, 8 Ves. 337; see also *Maddeford v. Austwick*, 1 Sim. 89; *Dalbiac v. Dalbiac*, 16 Ves. 116.

(*h*) *Gartside v. Isherwood*, 1 B. C. C. 561.

in distress, or dealing with expectancies or contingent or reversionary interests (*i*).

But the whole jurisdiction of equity to set aside such agreements depends upon there having been an advantage taken of the circumstances (*j*); only the Courts have adopted the rule of throwing it on the party obtaining the agreement, in such a case, to shew it was fair and proper (*k*).

Nor can the other party refuse to perform the agreement, if it is proved to be fair and reasonable. Thus a solicitor, who purchases from his client, is bound to prove that he paid that price for the property which, in the exercise of his professional duty, he would have advised his client to accept from a third person (*l*). But there is no such doctrine in our law as that an attorney cannot contract with his client, and such a contract, if fair, will be enforced (*m*). So an agreement with a man in gaol may be good, having proper assistance and advice, and in a fair manner (*n*).

Sir E. Sugden, C.I., said, "An attorney has as perfect a right as any other man to enter into a fair contract with his client, and the Court has no wish and no authority to impeach it" (*o*). A solicitor may deal with his client for a security for a third person; but he must do so fairly and with full information (*p*).

Agreements which are voidable as being made, to the disadvantage of one party, between two parties

(*i*) *Pickett v. Loggon*, 14 Ves. 215; *Bawtee v. Watson*, 3 M. & K. 339.

(*j*) *Peacock v. Evans*, 16 Ves. 512.

(*k*) *Gartside v. Isherwood*, 1 B. C. C. 561.

(*l*) *Champion v. Rigby*, 1 R.

& M. 539.

(*m*) *Cane v. Lord Allen*, 2 Dow. P. C. 289.

(*n*) 2 Ves. sen. 635.

(*o*) *Uppington v. Bullen*, 1 Con. & Laws, 295.

(*p*) *Higgins v. Joyce*, 2 J. & L. 294.

whom the law thus discourages from entering into agreements with each other, may be confirmed when the relative position of the parties is at an end; but this is rather the statement of a general rule than a principle which has been followed in decided cases, for the Court requires the strongest evidence, that the party should stand so unconnected with the preceding transaction as to have the complete power of determining, as upon an original act, whether he would do it or not (*q*).

It is laid down by Lord Brougham, C., in *King v. Hamlet*, that the extraordinary protection given in the general case (the sale of reversionary interests), must be withdrawn, if it shall appear that the transaction was known to the father or other person standing *in loco parentis*,—the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession, even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him (*r*).

Sir Edward Sugden states, that this rule is supported by no previous authority, and, as a general rule, cannot be maintained (*s*). But Lord Brougham's decision was affirmed by the House of Lords, and Lord Lyndhurst there stated his concurrence in the Chancellor's judgment (*t*).

And, it is submitted, the rule is correct as to contracts by persons respecting expectancies from a party

(*q*) *Purcell v. McNamara*, 14 Ves. 91; *Morse v. Royal*, 12 Ves. 361.

(*r*) 2 M. & K. 456. See p. 473.
 (*s*) V. & P. 316.
 (*t*) 9 Bligh's N. R. 610.

who is aware of the contract, because the concealment of such a contract from that party is made, in the early cases, the chief ground of objection to such transactions; the policy of the law being against a dealing with expectations, which is kept a secret from those by whose bounty the expectations are to be realized (u).

(u) See *Cock v. Richards*, 10 Ves. 429; *Woodhouse v. Shepley*, 2 Atk. 535.

CHAPTER III.

The Terms of the Contract must be understood by the Parties, certain and defined.

WHERE a contract has proceeded upon the mistake of both parties, that avoids the contract at law as well as in equity: if the one party might intend to sell upon one set of terms, and the other intend to buy according to a different set of terms, there is in reality no agreement between them (*a*). To constitute a contract at all, there must be what the civilians call a "*consensus in idem*" (*b*).

If neither of the parties to the contract understood that a particular thing was included in it;—if, as Lord Thurlow puts it, the buyer did not imagine he was buying any more than the seller imagined he was selling a part, a pretence on the part of the buyer to have the whole conveyed is contrary to good faith (*c*). If there has been a common mistake, it would be manifestly unjust to enforce the contract (*d*): if an agreement is entered into by two parties, neither of whom understand its full effects, on the ground of mistake and surprise, the Court not only refuses to

(*a*) Per Sir W. Grant, M.R.,
Higginson v. Clowes, 15 Ves. 516,
See p. 524.

(*b*) Dig. Lib. 1, s. 1, ss. de Pact.

(*c*) Calverley v. Williams, 1
Ves. jun. 210.

(*d*) Colyear v. Clay, 7 Beav. 188.

enforce the agreement, but will set aside the contract when executed, and not leave the parties to law (*e*).

Equity, however, goes farther than law in the force it allows to the objection that there has been any mistake in the transaction. A mistake common to both parties avoids the contract at law, and Equity will, as we have said, interfere to rescind a contract entered into upon such common misunderstanding. But if either party labours under a mistake at the time of the contract being made, Equity will not enforce it; the advantage which one party, who has a complete knowledge of the transaction and its effects, has over the other who only partially comprehends it, gives the agreement an aspect too unfair to admit of the extraordinary assistance of a Court of Equity (*f*). In fact, such a state of things amounts so nearly to fraud, that it is equally discountenanced by the Court: in the case of a party releasing or assigning his rights, ignorance of those rights induces equity to refuse to enforce the assignment or release (*g*). "In *Cocking v. Pratt*" (*h*), says Lord Brougham, C., "where Sir John Strange had to deal with the case of a mother contracting with her daughter, as to her share of the father's personal estate, he held the transaction to be void, on the ground that the mother plainly had better information than the daughter. But even if it be assumed that the mother knew no more of the real facts than the daughter, *Willan v. Willan* (*i*) is an

(*e*) *Willan v. Willan*, 16 Ves. 72,
and *Calverley v. Williams*, *ubi sup.*

W. 315; *Clifton v. Cockburn*, 3 M.
& K. 76.

(*f*) *Mason v. Armitage*, 13 Ves.
25.

(*h*) 1 Ves. sen. 400.

(*i*) *Ubi supra*.

(*g*) *Pusey v. Desbouverie*, 3 P.

authority to shew, that where both parties were in a state of equal ignorance as to the facts respecting which they were dealing, the transaction will not be supported" (*k*). We shall have hereafter to consider what actually amounts to fraud, the mistake originating with, and kept up by, the misrepresentations and suppressions of the parties (*l*).

If the misrepresentation is made knowingly by the one party, he cannot himself claim the aid of the Court, not coming with clean hands; but whether the misrepresentation is or is not a fraudulent one, if the other party was deceived by it, and so is in a worse position than he would have been had he known the real state of the case, the contract will not be enforced. In *Maddeford v. Austwick*, Sir John Leach, V. C., set aside an agreement, where the defendant had dealt with the plaintiff, for his share of the profits of their partnership concerns, without putting him into possession of all the information which he himself had from the accounts, and when the defendant must have known, from those accounts kept in his sole possession, that the sum agreed to be paid was not an adequate consideration (*m*).

Lord Hardwicke, in *Stockdale v. the South Sea Company*, said, "a Court of Equity will never decree a person to pursue a mistake, or effectuate an act, (which he had done through ignorance), after he comes to the knowledge of the reality of the fact" (*n*).

When an agent, by mistake, has omitted to secure the chief object for which he was directed to enter into

(*k*) *McCarthy v. Decaix*, 2 R. & M. 614. See p. 622.

(*l*) *Infra*, Book 1, Chap. 2.

(*m*) 1 Sim. 89, S. C. 2 M. & K. 279.

(*n*) 2 Atk. 141.

the agreement, the Court feels considerable hesitation in enforcing the contract against the principal (*o*).

In the case of *Mason v. Armitage*, where a purchase had been made at a low price, in consequence of a mistake of the person who had been employed to bid for the vendor, although no case of fraudulent misrepresentation on the part of the plaintiff had been made out, yet he was not allowed the benefit of the Court's assistance (*p*).

It seems to be necessary that the misrepresentation should have the effect of injuring the party entering into the contract, in order to prevent the Court from executing the contract at the instance of a person coming before it with clean hands, and no party to the misrepresentation (*q*).

But if a party enters into an agreement, and signs it, it will be useless for him to say, he did not know what he was signing. If he carelessly signs a paper, without making himself aware of the contents, he shall not be allowed, in a Court of Equity, to say it was a mistake. In a late case this doctrine was completely established by the House of Lords. If the party has incautiously signed an instrument, it is still binding on him in law and equity: and a Court of Equity would compel him to execute the necessary instruments for giving legal effect to it. A party who is wilfully ignorant of that which he ought to have known, who commits a mistake, because he does not

(*o*) *Helsham v. Langley*, 1 Y. & C. C. C. 175.

(*p*) 13 Ves. 25.

(*q*) *Fellowes v. Lord Gwydir*,

1 Sim, 63, affirmed 1 Russ. & M. 23; *Sturge v. Starr*, 2 M. & K. 195; *Trower v. Newcome*, 3 Mer. 704.

exercise the ordinary diligence which the law requires, will be bound, notwithstanding that mistake (*r*).

It is essential that the agreement be concluded; if the transaction amounts only to treaty, it will not sustain an action or suit (*s*). There must be not merely a treaty, still less a proposal for an agreement, but a treaty with reference to which mutual consent can be clearly demonstrated; a proposal met by that sort of acceptance which makes it no longer the act of one party, but of both (*t*). The Court is not to decree performance of a contract contained in letters, unless it can collect, upon a fair interpretation of the letters, that they import a concluded agreement. If it rest reasonably doubtful whether what passed was only treaty, let the progress towards the confines of the agreement be more or less, the Court ought rather to leave the parties to law, than specifically to perform what is doubtful in a contract (*u*). If, however, the essential terms are agreed upon between the parties, although it be their intention that a formal instrument should be drawn up, yet their agreement, if evidenced by writing, will be binding (*v*). A proposal must be accepted so as to bind the party receiving it effectually before it can be binding on the party making it, but an absolute undertaking requires no such acceptance, but will be enforced, although the other party has not bound

(*r*) *Duke of Beaufort v. Neeld*, 12 Cl. & Fin. 248. The cases where the Court has granted relief on the ground of mistake are there collected, p. 261.

(*s*) *Stratford v. Bosworth*, 2 V. & B. 341.

(*t*) Per Lord Eldon in *Kennedy v. Lee*, 3 Mer. 441.

(*u*) Per Lord Eldon in *Huddleston v. Briscoe*, 11 Ves. 583. See p. 591.

(*v*) *Fowle v. Freeman*, 9 Ves. 353.

himself by writing (*w*). There must however be a valuable consideration of some sort for the undertaking (*x*).

A parol agreement, which is afterwards put in writing, is regarded as mere treaty (*y*).

Undoubtedly, one of the ingredients of a contract, the performance of which can be decreed, is certainty (*z*). This certainty as to the terms may be made to depend on the opinion of third parties as arbitrators; and the Court has always and will decree specific performance of an award as of any other agreement (*a*). So it has been decided, that a contract by A. to sell such allotment as the commissioners under an inclosure act should make to him, ought to be specifically performed (*b*).

It is only necessary that the essential terms be fixed: if the agreement is binding and concluded, and such as ought to be executed, the Court does not require foreign aid to carry the details into execution (*c*). So that, if these details were agreed to be settled by an arbitrator, the Court will substitute the Master for the arbitrator; but, unless the essential terms are fixed, the Court will not interfere (*d*).

In the construction of agreements, equity follows the law. The Court is bound by the construction

(*w*) *Palmer v. Scott*, 1 R. & M. 391. See p. 394.

(*x*) See *post*. B. 1. chap. 4.

(*y*) Per Lord Lyndhurst, C., *Smith v. Henley*, 1 Phillips, 391. See p. 397.

(*z*) Per Sir T. Plumer, M. R., *Clermont v. Tasburgh*, 1 J. & W. 113. See p. 115; see 3 Ves. 420.

(*a*) *Wood v. Griffith*, 1 Swan. 43; *Barker v. Barker*, Cary, 77; *Bignold v. Latham*, Cary, 151.

(*b*) Cited by Lord Thurlow, 1 B. C. C. 158; *Kingsley v. Young*, 17 Ves. 469, aff.; 18 Ves. 207.

(*c*) *Gourlay v. Duke of Somerset*, 19 Ves. 431; per Lord Eldon, in *Wilks v. Davis*, 3 Mer. 509; *Lord Radnor v. Shafto*, 11 Ves. 448; *Gregory v. Mighell*, 18 Ves. 328.

(*d*) *Milnes v. Gery*, 14 Ves. 409; *Hopcraft v. Hickman*, 2 Sim. & St. 130; *Wilks v. Davis*, *ubi sup*.

which the language receives from a Court of Law, and it is not bound to find an equitable effect for a clause, merely because the construction which a Court of Law has put upon it could leave it inoperative (*e*).

It often happens that an agreement being only available in equity, or the party choosing to have a specific performance, questions as to the construction of agreements come before Courts of Equity. A very difficult class of these agreements are those contained in letters, especially those either in letters or memoranda, relating to marriage (*f*). The Courts have, very properly, not required the agreement to be so distinctly made out in the case of a marriage agreement, as in another case; and the Court cannot decline its jurisdiction on account of the uncertainty or ambiguity, unless it is impossible to do any justice, because, the marriage having taken effect, the parties cannot be put back into the position in which they were (*g*).

(*e*) Per Lord Mansfield, *Douglas*, 277; *Eaton v. Lyon*, 3 Ves. 692; *Butcher v. Butcher*, 9 Ves. 352; *Stewart v. Alliston*, 1 Mer. 33; *Gladstone v. Birley*, 2 Mer. 400; *Ball v. Storie*, 1 S. & St. 213; *Sunderland v. Newton*, 3 Sim. 450; *Holzappel v. Baker*, 18 Ves. 115;

Browne v. Warner, 14 Ves. 156 & 409; *Lufkin v. Nunn*, 11 Ves. 170.

(*f*) *Duke of Bedford v. Marq. of Aberdeen*, 1 M. & C. 312.

(*g*) The cases upon this subject are collected in a late case before the Lord Chancellor of Ireland. *Maunsell v. White*, 1 J. & L. 527.

CHAPTER IV.

The Consideration of the Contract must be valuable.

It is essential, in order that a Court of Equity should execute a contract, that it be entered into for a valuable consideration. Indeed, at common law, a contract without a valuable consideration confers no right, and if in writing, not under seal, will not be a sufficient ground of action; but, at common law, a deed imports a consideration. Equity, however, gives no assistance to voluntary contracts, however proved. "I have no doubt," says Lord Cottenham, C., "that the Court will not execute a voluntary contract; and my impression is, that the principle of the Court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement" (a).

Thus, where there was no consideration for the extension of an agreement for a lease at a low rent, the Court refused to extend the term (b); and, in *Tufnell v. Constable*, the plaintiff had given a bond for £1200 to a person who, by an indorsement on the bond, forgave him a portion of the money due. The executors of the obligee bringing an action on the

(a) *Jeffreys v. Jeffreys*, Cr. & 133; *Robertson v. St. John*, 2 B. Ch. 138. C. C. 140.

(b) *Robson v. Collins*, 7 Ves.

bond, Sir L. Shadwell, V. C., refused to restrain it, saying, that the plaintiff gave no consideration for the alleged release, and that, as he was a volunteer, he had no right to come into equity for relief (*c*), and, generally, the Court will not lend its aid to enforce a voluntary agreement, or complete an imperfect gift (*d*).

The decisions of Lord Cottenham on this subject may be considered as establishing the law, as to which there had been considerable difference of opinion among earlier Judges. It had always indeed been laid down, that a mere volunteer was entitled to no assistance in a Court of Equity: there was no injustice in refusing his claim, the conscience of the contracting party was not bound, but what is called a meritorious consideration was regarded at times with great favour.

The first argument for allowing a meritorious consideration to be sufficient to support a contract, which equity will enforce, is derived from the rules of the Court before the Statute of Uses. At that time the Court compelled the specific performance of agreements for valuable or meritorious considerations, and they viewed meritorious considerations in a very favourable light, holding them to include not merely a wife or child, but some collaterals, as a brother, nephew, or cousin. A covenant to stand seised was a mere contract or agreement by a person to settle or hold his estate for the benefit of his family, and a meritorious consideration alone, without a valuable consideration, was sufficient to support such a con-

(*c*) 8 Sim. 69.

(*d*) *Edwards v. Jones*, 1 M. & C. 226; *Meek v. Kettlewell*, 1 Phillips, 345, S. C. 1 Hare, 469;

Searle v. Law, 15 Sim. 95; *Callaghan v. Callaghan*, 8 Cl. & Fin. 874.

tract. Afterwards came the Statute for Transferring Uses into Possession: that statute made no other change, than that of transferring or turning the use into a possession, which carries the legal right; now in that view the statute operated on the original consideration (*e*).

In *Watts v. Bullas* (*f*), Lord Keeper Wright said, that as the consideration of blood would, at common law, raise an use, and as, before the statute of 27 Hen. 8, such *cestui que* use should have compelled an execution of the use in a Court of Equity; so would an imperfect conveyance raise a trust, in respect of the consideration of blood, and, consequently, ought to be made good in equity.

This was, undoubtedly, fairly carrying out the principle: but Lord Hardwicke refused to concur. He said, the reasoning of the Lord Keeper was too large, owing to his being then new in the Court, and pursuing the maxims of law too far as to the consideration of blood to raise an use, for that would carry it to the remotest blood that could raise an use in law (*g*).

But the moment that it was conceded that Courts of Equity were not to be judged by the rules of equity before the statute, the force of the argument was lost. Lord Hardwicke said the doctrine was carried too far. Sir Edward Sugden says, that it ought to be restrained within proper limits, a provision for a wife or children. But if the old rule of equity was to be abandoned, the

(*e*) Per Sir E. Sugden, C. L.,
Ellis v. Nimmo, L. L. & Goold, t.
 Sug. 333. See p. 346.

(*f*) 1 P. W. 60.
 (*g*) 3 Atk. 189.

consideration of blood would be altogether powerless to induce a Court of Equity to act. And it must now be considered as settled law, that no consideration, however meritorious, is sufficient to induce a Court of Equity to enforce a contract founded on it. The same reasoning will apply to one class of meritorious considerations as to another, and the rule that any distinction between them cannot be recognised is the soundest.

Another argument has been raised, to induce a Court of Equity to execute a contract founded on a meritorious consideration, from the fact, that such a consideration is taken into account in equity, when aiding defective executions of powers, and defective surrenders of copyholds. But the language of the greatest Judges shews how little the decided cases upon these points can be supported on principle; and that on no account will their doctrine be extended. "It is difficult," said Sir William Grant, in *Holmes v. Coghill*, "to discover a sound principle for the authority the Court assumes for aiding a defective execution of powers in certain cases" (*h*); and Lord Eldon said, "It is rather difficult to make out how the defect, in the cases of powers and copyholds, came to be supplied in favour of a child. If, in the instance of the want of a surrender of copyhold estate, the circumstance of the devise to the child is considered, the more natural conclusion is, that, the testator, whatever his purpose was, going only

(*h*) 7 Ves. 507. It was, however, the constant practice, and still continues to be so, to supply defective executions of powers for the benefit of children. *Simeon v. Simeon*, 4 Sim. 558; see as to

supplying defective surrenders of copyholds. *Hiles v. Downton*, 5 Ves. 457; *Perry v. Whitehead*, 6 Ves. 544; *Fielding v. Winwood*, 16 Ves. 90; *Garn v. Garn*, 16 Ves. 268; *Rodgers v. Marshall*, 17 Ves. 299.

so far towards it, and not proceeding to make it effectual, had dropt it. So, the attempt to execute a power is no more than an intimation, that the party means to execute it; but, if all the requisite ceremonies have not been complied with, it cannot be supposed, that the intention continued until his death" (i).

In *Ellis v. Nimmo* (j), Sir Edward Sugden, C.I., decreed the specific performance of a post-nuptial agreement, by which a father made a provision for a child, grounding his decree upon the favour with which meritorious considerations were regarded by Courts of Equity, as supporting a use before the statute, and as such inducing the Court to supply defective executions of powers and defective surrenders of copyholds (k).

This case has, however, been in effect overruled by Lord Cottenham, who decided that the Court would give no more effect to a meritorious consideration than as if there had been no consideration at all (l); and this is the doctrine at law (m).

Where a trust is actually created in favour of a volunteer, a Court of Equity will enforce its execution (n). It fastens upon the conscience of the trustee. "It is clear," says Lord Eldon, "that this Court will not assist a volunteer; yet if the act is completed though voluntary, the Court will act upon it" (o).

(i) *Finch v. Finch*, 15 Ves. 43. See p. 51.

(j) *Ubi supra*.

(k) But see *Watts v. Bullas, ubi sup.*

(l) *Dillon v. Coppin*, 4 M. & C. 647; *Jeffreys v. Jeffreys*, Cr. & Ph. 138. The case of *Carey v. Stafford*, 3 Swan. 427 (n) can hardly be relied on as an authority now.

(m) A meritorious consideration will not support an assumpsit at law, *Beaumont v. Reeve*, 10 Jur.

284; *Bennall v. Adney*, 3 B. & P. 247 (n). *Eastwood v. Kenyon*, 11 Ad. & Ellis, 438.

(n) *Colman v. Sarrel*, 3 Bro. C. C. 12, S. C. 1 Ves. jun. 63; *Ellison v. Ellison*, 6 Ves. 656; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Bill v. Cureton*, 2 M. & K. 503, a judgment of Lord Cottenham's.

(o) *Ex parte Dubost*, 18 Ves. 149. See as to an imperfect gift, *Cotteen v. Missing*, 1 Mad. 186.

But the Court looks at the intention of the party creating the trust. This has governed the decisions of the Court in the case of trust deeds for the payment of creditors. The question is, whether the debtor merely appointed an agent, retaining to himself full authority over him, and in fact providing that the agency should not be called into action without his consent, or whether for valuable consideration he entered into a deed of trust (*p*).

In *Garrard v. Lord Lauderdale* (*q*), Sir L. Shadwell, V. C., thus states the rule, "where a person does without the privity of any one without receiving consideration, and without notice to any creditor, himself make a disposition, as between himself and his trustees, for the payment of his debts, he is merely directing the mode in which his own property shall be applied for his own benefit," and in *Bill v. Cureton* (*r*), Lord Cottenham, then M. R., said "a man who, without any communication with his creditors puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself by the payment of his debts—his object is not to benefit his creditors: it would therefore be a result most remote from the contemplation of the debtor, if it should be held that any creditor discovering the transaction should be able to fasten upon the property and invest himself with the character of a *cestui que trust*. I, therefore, feel no disposition to question or to depart from the rule established by the two cases of

(*p*) *Law v. Bagwell*, 4 Dr. & W. 398; *Wilding v. Richards*, 1 Coll. 686.

(*q*) 3 Sim. 1, see p. 12, affirmed 2 R. & M. 451.

(*r*) 2 M. & K. 503. See p. 511.

Wallwyn *v.* Coutts (*s*), and Garrard *v.* Lord Lauderdale (*t*).

Sir James Wigram, V. C., says, in *Malcolm v. Scott* (*u*), "nothing, I conceive, can be more clear than that instructions communicated by a principal to his own agent, to apply the property of the principal in payment of a particular creditor, do not *per se* give that creditor any lien upon the property in the hands of the agent, *Scott v. Porcher* (*v*); I think it equally clear that the mere announcement by a principal, even to his creditor, that such an arrangement has been made by himself for the payment of the creditor's debt, would not alter the case or give the creditor a lien: for this authority can scarcely be wanting; but if it were, the case of *ex parte* Heywood (*w*), a case in bankruptcy, and one, therefore, which involved the equity as well as the law of the case, the principle of the decision in *Garrard v. Lord Lauderdale* (*x*) and the explanation which is given by Lord Cottenham in *Bill v. Cureton* (*x*), of that and other cases of the same class, would remove all difficulty upon the subject. It is clear that, notwithstanding such direction or communication, the property may remain under the dominion of the debtor."

But if any consideration flows from the creditor, the deed is no longer voluntary, much less a deed made merely for the benefit of the maker; and it can be enforced by the creditor. It is a question of considerable difficulty, what amounts to such a consideration?

(*s*) 3 Mer. 707, and more fully in 3 Sim. 14.

(*t*) *Ubi supra*.

(*u*) 3 Hare, 39. See p. 46.

(*v*) 3 Mer. 652.

(*w*) 2 Rose, 355.

(*x*) *Ubi sup*.

In *Browne v. Cavendish* (x), Sir E. Sugden, referring to *Acton v. Woodgate*, says "I observe that the Master of the Rolls in speaking of *Garrard v. Lord Lauderdale*, says 'that it seems to have been considered in that case, that a communication by the trustees to the creditors of the fact of such a trust would not defeat the power of revocation by the debtor. It appears to me, however, that the doctrine is questionable, because the creditors being aware of such a trust, might be thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised.' When I first read that case, I made this observation in the margin, 'that has always been my opinion; but in stating this, I do not mean to bind myself to hold that in every case, a representation to a creditor will give him the benefit of the trust. It must depend on the character of the representation and the manner it is acted on.'"

A man may not create a trust for the benefit of his creditors, communicate it to them and obtain from them the benefit of their lying by until perhaps the legal right to sue was lost, and then insist that the trust was wholly within his own power (y).

Of course, if the agency is created at the instance of the creditor, it is for his benefit. This is the case of *Burn v. Carvalho* (z), where there was a promise to pay out of a particular fund in answer to an application for payment out of that very fund.

It is clear that a party may so constitute him-

(x) *Ubi sup.*

(y) Per Sir E. Sugden, C. L., in *Browne v. Cavendish*, 1 Jones & Lat. 635; *Acton v. Woodgate*, 2

Mylne & Keen, 492; *Gibbs v. Glamis*, 11 Sim. 589.

(z) 4 M. & C. 690.

self a trustee that a Court of Equity will execute the trust in favour of a volunteer (*a*). The case of *Sloane v. Cadogan* (*b*), which has been considered as an authority that there might be a voluntary settlement made without a transfer of the fund to trustees, when examined, does not justify that notion; the question was only whether the persons who had the legal custody of the fund had been really constituted trustees, and although the application of Sir William Grant's reasoning has been questioned, yet both his reasoning and his decision upon the facts of the case have been approved of by succeeding Judges (*c*).

If there is a valid obligation at law, if a voluntary deed of covenant be entered into for the payment of money, the Court, in administering assets, will direct the payment of the money, and if the money is directed to be paid to a trustee for the volunteer, and the trustee refuses to act, will itself execute the trust (*d*). In *Lechmere v. Lord Carlisle* where a voluntary covenant was entered into for the payment of a sum of money to be laid out in land, the Court compelled the payment of the money and the laying it out in land (*e*).

Marriage is a consideration of the most valuable nature, and not to be measured in a Court of Justice by any pecuniary amount; but a very difficult question

(*a*) *Ex parte* Dubost, 18 Ves. 149; *Wheatley v. Parr*, 1 Keen, 551; see 3 P. W. 221.

(*b*) *Sugden, V. & P.* 119. See as to appointment under a reserved power by obligor of a voluntary bond, *Wollen v. Tanner*, 5 Ves. 218.

(*c*) *Edwards v. Jones*, 1 M. & C.

238; *Beatson v. Beatson*, 12 Sim. 289; *Collinson v. Patrick*, 2 Keen, 123.

(*d*) *Fletcher v. Fletcher*, 4 Hare, 14; *Clough v. Lambert*, 10 S. 174; *Watson v. Parker*, 6 B. 283.

(*e*) 3 P. W. 221. See also *Edwards v. Countess of Warwick*, 2 P. W. 176.

48 PARTIES WITHIN THE CONSIDERATION OF MARRIAGE

connected with the specific performance of contracts for which marriage is the consideration, is as to who are within the consideration.

The doctrine that a Court of Equity will give no relief upon a covenant that is voluntary, was applied by the Lord Keeper in 1674 to a covenant upon marriage, to settle copyholds upon the wife and issue and then upon the brother of the covenantor, he said that as to the plaintiff, who was the brother, the covenant was merely voluntary and matter of kindness (*f*).

In *Neeve v. Keck*, 1726, it was objected to the execution of a covenant upon marriage to settle lands after limitations which failed to the heirs of the husband, which was prayed by his daughters of the first marriage, that as respects them the covenant was voluntary, and they were not within the consideration of the settlement. The bill was sustained on the ground that there were other considerations than that of marriage (*g*). But unless the word "heirs" was a word of purchase, the consideration flowing from the husband would be sufficient; thus, in *Wood v. Pesey*, a covenant to surrender a copyhold to the use of the wife for life, remainder to the use of the heirs of the wife, was enforced by directing a surrender after the death of the husband to the use of the wife and her heirs (*h*).

In *Jenkins v. Kemish* (*i*), Lord Hale is reported to have said, "that the consideration of marriage and the marriage portion will run through all the estates

(*f*) *Bellingham v. Lowther*, 1 Ch. 547, pl. 36. See *Godsal v. Webb*, Ca. 243. 2 Keen, 99.

(*g*) *Neeve v. Keck*, 9 Mod. 106.

(*h*) *Wood v. Pesey*, 5 Vin. Ab.

(*i*) 1 Levinz, 150, 237, 1 Ch. Ca. 103.

raised by the settlement though the marriage be not concerned in them so as to make them good against purchasers, and to avoid a voluntary conveyance. In *Osgood v. Strode* (j), Lord Macclesfield is reported to have said, "the marriage and the marriage portion supports only the limitation to the husband and wife and their issue, this is all that is presumed to have been stipulated for by the wife or her friends."

In *Sutton v. Chetwynd* (k), Sir Wm. Grant, M. R., said "the question is whether the covenant [in the marriage settlement in favour of Sir Richard Sutton] is to be considered as merely voluntary, and therefore not to be carried into execution in a Court of Equity, or whether the consideration of marriage does not extend to all the limitations and agreements contained in the articles. * * No consideration moved from Sir Richard Sutton; nor does it appear that he was related in blood to any party from whom any consideration did move or indeed to any of the parties to the marriage articles. It seems, therefore, that nothing short of the broad general proposition attributed to Chief Justice Hale, in *Jenkins v. Keymis*, could support his claim." His Honor then referred to the case of *Johnson v. Legard*, where there were limitations in a marriage settlement to the brothers of the settlor and said, "the Court of King's Bench have certified that the limitations to the brothers were void against the purchasers. This decision expressly negatives the proposition that every limitation is protected and rendered valuable by the consideration of marriage:" and he dismissed Sir Richard Sutton's

(j) 2 P. W. 249.

(k) 3 Mer. 249. See T. & R. 296.

bill. In *Johnson v. Legard* (*l*), Lord Eldon said, "that if there had been nothing more in the case than that the settlement was made upon the marriage, the remainder would have been held to be voluntary and void against a subsequent purchaser."

Sir Edward Sugden, C. I., in *Stackpoole v. Stackpoole* (*m*) said, "it is clear that limitations to the collateral relations of the settler do not fall within the consideration of the marriage;" and this may be considered as settled. It follows then, according to Sir William Grant's decision, that such limitations will not be executed by a Court of Equity.

But although, when marriage is simply the consideration, and when equity is only called to enforce the contract for a collateral relation, it will not interfere; yet a great number of cases have occurred where, in marriage settlements, such limitations have been executed.

Lord Hardwicke, in *Stephens v. Trueman* (*n*), gives the key to many of these decisions. "The old rule was, and is now generally (although of late not so strictly adhered to), that none can come here for a specific performance, who does not come under the consideration of the agreement; as that it shall not be for the benefit of collateral branches in marriage articles; but as agreements are entire, and the several branches might have been in view, the Court has in later cases laid hold of any circumstances to distinguish them out of it, still preserving the rule in general. If, therefore, there was any kind of consideration, [besides], the

(*l*) Turn. & Russ. 293. See
Cormick v. Trapaud, 1 Dow. P. C.
60.

(*m*) 4 Dr. & W. 352.
(*n*) 1 Ves. 73.

Court would lay hold of it to support it, as in *Osgood v. Strode*" (*o*).

In this case Lord Macclesfield directed a specific performance of a covenant to settle lands, after limitations to the husband and wife and their issue, to a nephew, on the ground that the circumstances made it probable that it was part of the marriage agreement and the inducement to the principal settler to join therein. His decision, in *Edwards v. the Countess of Warwick* (*p*), was on the same ground.

Lord Hardwicke added, "the Court has got out of it in another way, as in *Vernon v. Vernon* (*q*), because an action might be brought at law."

Vernon v. Vernon (*q*) was the case of a covenant to settle lands, after the ordinary limitations, upon the brothers of the husband. Lord King, C., upon its being urged that the only course was to allow the plaintiffs to bring an action in the name of the trustees, said that this was not an adequate remedy, and decreed a specific performance. But it is doubtful, whether at present the Court could so far take for granted the decision of the Court of Law, and its effect as specifically to perform such a covenant. *Fletcher v. Fletcher* (*r*), before referred to, only went the length of directing the payment of a voluntary bond out of the assets of a testator in a suit for the administration of his estate.

In *Goring v. Nash* (*s*), Lord Hardwicke suggested another ground: he said, "the plaintiff being clearly entitled to a specific performance of part of the articles;

(*o*) 2 P. W. 249.

(*p*) 2 P. W. 176.

(*q*) 2 P. W. 544.

(*r*) 4 Hare, 74.

(*s*) 3 Atk. 186.

there was no instance of the Court decreeing a partial performance of articles: it must decree all or none." So, in *Vawser v. Jeffrey* (*t*), Sir William Grant remarked—"it is said that the marriage was a consideration for nothing more than the jointure to be settled upon the wife, and that a Court of Equity would only have decreed that a jointure should be secured to her. I have found no instance of a covenant so partially executed."

In the recent case of *Davenport v. Bishopp* (*u*), there was a covenant in the settlement between Mr. and Mrs. Davenport, that the future estate of the wife should be settled, in the event of her death without issue, for the benefit of Mr. Davenport for life, with remainder to her niece. Mr. Davenport, after the death of his wife without issue, filed a bill against her heiress-at-law for the specific performance of the covenant. Such a bill was clearly sustainable, and the Court would execute the whole contract; but some expressions fell from the Judges who decided the case, that seem to put their support of the bill on other grounds. Sir James Knight Bruce, V. C., thought "that if two parties, in contemplation of a marriage intended, and afterwards had between them, or for any other consideration between themselves coming under the description of 'valuable,' have entered into a contract together, in which one of the stipulations made by them is a stipulation solely and merely for the benefit of a third person, that third person being even a stranger in blood to each, a stranger to the contract, and a person from whom not any valuable or other

(*t*) 16 Ves. 527.

(*u*) 2 Y. & C., C. C. 261.

consideration moves, has moved or is to move, it cannot, generally speaking, be competent to one party to the contract, or to those representing that party in estate, to say to the other party to the contract, 'whatever may be your wishes, whether you assent or dissent, that stipulation shall go for nothing, or shall not have effect given to it.'"

Now this is undoubtedly true of any contract for an ordinary valuable consideration; though, in such a case, the third parties cannot themselves sustain a bill; for, in *Colyear v. the Countess of Mulgrave* (*v*), there was an agreement between two parties for valuable consideration as between themselves, and the benefit they took under it, but without any consideration flowing from certain third parties who took a benefit under it. Lord Langdale, M. R., allowed a demurrer to their bill for performance of the contract.

But it is submitted, that it is hardly correct to treat marriage as a valuable consideration for purposes of this nature. Marriage is only a valuable consideration moving from those within its sphere: they are only the husband and wife and the children of the marriage (*w*). Take the case of a husband or wife, previous to the marriage, refusing to marry unless upon that marriage a provision is made by the other party for a mere stranger, such a provision being made and the marriage taking effect, can that provision be supported by the consideration of marriage against creditors? Certainly not, and unless there is the intervention of other parties, it never has been sup-

(*v*) 2 Keen, 81. See *Burrows v. Greenwood*, 4 Y. & C. 251.

(*w*) *Nairne v. Prowse*, 6 Ves. 759.

ported, nor, standing alone, would it be enforced by a Court of Equity.

Lord Lyndhurst, C., in affirming *Davenport v. Bishopp*, made a distinction between an agreement being supported against relations in a family and against purchasers and creditors, citing the authority of Lord Hardwicke for it. But Sir William Grant decided that the Court would not enforce a contract for a consideration which would not protect the contract if executed against purchasers (*x*). His Lordship, however, decided the case on the true ground, namely, that the Court would not divide the covenant, that Mr. Davenport was entitled to a specific performance so far as he was concerned, and that the agreement would be therefore performed as far as related to the niece. The Court would not decree a specific performance in favour of the plaintiff as to part, and send him to law as to the residue (*y*).

In *Newstead v. Searles* (*z*) it was urged, that articles entered into by a widow, on her second marriage, for the benefit of the issue of the first, were not binding. Lord Hardwicke said, "If I was to lay it down as a rule, that such articles as these are not binding, it would become impossible for a widow, on her second marriage, to make any certain provision for the issue of a former, and the second husband might then contrive to defeat the provision made for those children. I am of opinion that these articles ought not to be considered as a voluntary agreement." The circumstances of the case would support the decision on other

(*x*) *Sutton v. Chetwynd*, 3 Mer.
249.

(*y*) 1 Phillips, 698.
(*z*) 1 Atk. 265.

grounds, but it seems to be generally admitted that a provision of this nature is not voluntary (*a*).

In *Needham v. Smith* (*b*), where; on his second marriage, a man covenanted to leave all the real estate he should become possessed of among the children either of his first or second marriage, who should be living at his death, no distinction was taken between the two classes of children, or that the covenant was voluntary in the one case and not in the other: and in the argument on appeal, in *Davenport v. Bishopp*, this was put as a case which would not be considered as voluntary; but in *Ricketts v. Loftus* (*c*), it was argued that a settlement by the husband, on his second marriage, was merely voluntary as to the children of the first marriage: and there seems no reason for holding such a settlement by a man before marriage to be more valuable than on any other occasion, unless the second wife relinquishes some of the rights she acquires herself by the marriage in favour of these children, and so becomes a purchaser for their benefit.

Settlements made after marriage will be executed, if there is a valuable consideration given for them; as where a settlement is made on each side; but, in such cases, the consideration of marriage is wholly out of the question. The covenants are mutually dependant; if the one is not performed, the other cannot be enforced (*d*), and any great inequality would induce a suspicion of fraud, and cause the settlement to be considered as in fact voluntary; all these remarks

(*a*) *Davenport v. Bishopp*, 2 Y. & C., C. C. 26; & 1 Ph. 698; *Hunt v. Matthews*, 1 Vern. 408; *Poulson v. Wellington*, 2 P. W. 533; *King v. Cotton*, 2 P. W. 674; but see *England v. Downs*, 2 Beav. 522.

(*b*) 4 Russ. 318.

(*c*) 4 Y. & C. 519.

(*d*) *Ex parte Hall*, 1 V. & B. 112; *Woodcock v. Monckton*, 1 Coll. 278.

apply to settlements before marriage made in favour of those not within the consideration, and supported, as to them, by the doctrine of *Osgood v. Strode* (*e*). Even a settlement before marriage might be fraudulent, and the Court might not allow the consideration of marriage to support it, but the fraud must be distinctly proved and made out to induce the Court to act (*f*).

It is sometimes a nice question as to whether a consideration is voluntary or not: a valuable consideration will equally arise, where a person gives up a certain pecuniary advantage at the time of the grant, as where a sum of money is actually paid down at the time (*g*).

Past services are not a sufficient consideration for a present promise; this has been always held at law, and is the doctrine of Courts of Equity. If a consideration is executed, and does not go along with the contract, but is entirely past, and the contract is merely subsequent, it is not a sufficient consideration to support a contract (*h*). The transaction must be all one.

This is perfectly illustrated by the case of *Robertson v. St. John*. A tenant for life had agreed to grant a lease for thirty-one years: the lessee entered and expended considerable sums; the tenant for life died, and his son, the tenant in tail, wrote to the lessee that, as he had expended a good deal of money, the lease should be confirmed. The assignees of the lessee

(*e*) *Ante* p. 51.

(*f*) *Richardson v. Horton*, 7 Beav. 185.

(*g*) *Stiles v. Attorney General*,

2 Atk. 152; *Lady Herbert v. Earl Powis*, 6 Brown, P. C. 102.

(*h*) *Jameson v. Skipwith*, 1 B. C. C. 39.

filed a bill for specific performance of the promise; the defendant demurred, and Lord Thurlow, C., allowed the demurrer; he said, "the promise was *nudum pactum*, which equity would not perform in specie," and added, "that the circumstance of laying out money afterwards, as it was voluntary, could not vary the nature of the case" (i).

In *Seton v. Seton*, Lord Thurlow would not undertake to say, that a promissory note given by a woman to a trustee for her child was *nudum pactum* (j).

The wife's equity supports a settlement of her property, and where a trustee of money, which the husband is entitled to in right of his wife, will not pay it, unless he make a settlement on his wife, this is good consideration for the settlement (k).

The release by the husband of his interest, in the future acquired property of the wife, is a good consideration from the husband to support his claim to an annuity covenanted to be paid to him by his wife out of her separate estate in separation, and the covenant will be enforced by the Court (l).

In *Fenner v. Taylor*, the husband of a lady entitled to some personal property in Court, agreed that it should be settled upon her; and that agreement was proposed to be carried out by a settlement on the wife and children, afterwards the wife waived the settlement. This agreement, Sir W. Grant considered a voluntary one, for he directed the money to be paid to the husband. Sir John Leach, when Vice Chan-

(i) 2 B. C. C. 140.

(j) 2 B. C. C. 610.

(k) *Middlecome v. Marlow*, 2

Atk. 519.

(l) *Logan v. Birkett*, 1 M. & K.

225.

cellor, held a different opinion, he considered it as a purchase by the husband of the wife's equity to a settlement, and that it could not be regarded as a merely voluntary instrument. It seems difficult to understand how the Vice Chancellor could have considered the husband as giving any consideration, because it was not in his power to do anything in the matter; the wife alone had an equity, he gave up nothing to which he had an absolute right. Lord Brougham, C., concurred in the judgment of Sir W. Grant, and reversed the decision of the Vice Chancellor, who however, on the case coming to him again as Master of the Rolls, expressed himself dissatisfied with the judgment (*m*).

It seems that an agreement for the partition of an estate implies a good consideration, it amounting to an exchange (*n*), part performance of such an agreement although made by parol only will bind, and a contingent advantage to one only will not affect the validity of the transaction (*o*).

If, by a deed of composition a creditor release his debtor, a subsequent agreement between them (not by deed) that the debt shall be paid in full cannot stand, unless supported by a valuable consideration beyond the mere fact of the released debt; the case of a bankrupt promising after his certificate, stands on a different footing, namely, the remedy only is gone (*p*).

But a contract though not to be enforced, at first, on account of its voluntary character, yet may from

(*m*) 1 Sim. 169, 2 R. & M. 190.

(*n*) Bolton v. Ward, 4 Hare, 534.

(*o*) Ireland v. Rittle, 1 Atk. 541.

(*p*) Per V. C. K. Bruce, Watts v. Hyde, 2 Coll. 379.

subsequent transactions be capable of being enforced. Sir E. Sugden, C. I., said "the case of *Prodgers v. Langham* (*q*), followed by *George v. Milbanke* (*r*), and subsequent cases, shew that from the moment of a settlement of a share belonging to a voluntary grantee the voluntary grantee is to be regarded as a purchaser (*s*). And it would seem that a voluntary contract, assigned for a valuable consideration, may be enforced by the assignee (*t*).

(*q*) 1 Siderf. 133.

(*r*) 9 Ves. 190.

(*s*) *Martin v. McNamara*, 4 D. & W. 429. See *Meggison v. Fos-*

ter, 2 Y. & C., C. C. 536.

(*t*) See *Crofton v. Ormsby*, 2 Sch. & Lef. 583.

CHAPTER V.

There must be Mutuality of Consideration and Remedy.

THE consideration must flow from both parties: a promise to pay money does not make a contract (*a*), unless there be reciprocal obligation. In contracts everything requisite ought to concur as the consideration on the one side, and the promise or sale on the other side. In fact, although the consideration is generally spoken of as being the motive for the party's agreeing to do or not to do a particular act, yet in the eyes of the party who supplies that motive, it is the agreement of the other party.

But not only is it the principle of law that both parties must receive a benefit from the contract, but it is also the rule, that the law only considers that as a benefit, in cases of contracts purely executory, which it can assure to the other party. Courts of Equity follow the law: each party at law must be bound to confer a benefit on the other, or there is no agreement at law; and unless a Court of Equity can secure the performance of the agreement on both sides, there is no agreement upon which the Court will act, although that portion of the agreement, which the party applying to the Court may desire to be carried out, may be within the power of the Court.

(*a*) Blackstone, Com., Book 2, Chap. 30. "Our law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio*."

It is always an answer to a bill for specific performance of an agreement by one party, that if the defendant were to seek performance of the same agreement against the plaintiff, he could not obtain it: both parties must be bound, otherwise there can be no valid agreement (*b*).

It is not, however, considered requisite that an agreement should at the time be binding on both parties; it is sufficient if an agreement, signed by one party, be afterwards accepted and acted on by the other (*c*). It is now clearly settled, that a plaintiff may obtain a decree for specific performance of an agreement signed by the defendant alone. Lord Redesdale seriously questioned the rule, upon the ground of want of mutuality; but to this it has been answered, that the party who has not signed the agreement, by filing the bill, gives the Court jurisdiction to bind him by the agreement, and from that moment there is mutuality of remedy (*d*).

It is a rule of equity, necessarily following from that which requires mutuality of consideration and remedy, that contracts must be decreed to be performed on both sides, and entirely or not at all (*e*). The rule of law is, that no contract can be apportioned, and although equity controls the rigid application of this rule, yet it proceeds upon the same broad principle, and refuses to decide whether the parties did or did not rely or wish to insist upon some one part of the contract rather than another. There

(*b*) See *infra*, pp. 63, 64.

(*c*) *Dowell v. Dew*, 1 Y & C., C. C. 352. See p. 356.

(*d*) *Flight v. Bolland*, 4 Russ.

298; *London and Birmingham Railway Company v. Winter*, Cr. & Ph. 63.

(*e*) *Vin. Ab.* 5, 506, Owen, 10.

may be cases where there are several distinct agreements, one of which may be executed, although the others are unperformed; but if the whole was but one contract, which could not be executed, no part of it could be executed (*f*).

The Court does not insist that the mutuality should have existed at the time of the contract being entered into; it is sufficient if it exists when the case is brought before it for decision; on this ground, if a party contracting to sell can acquire a title before the hearing, it is sufficient (*g*).

The Court, it is said, will not enforce the performance of an agreement, the execution of which can no longer be of use to the defendant. This was decided in a case of ——— *v. White* (*h*); but Sir Edward Sugden, C. I., in *Clarke v. Moore*, referring to this case, says, "There are other cases in which a man having entered into a contract for a specific purpose, which afterwards failed, has not been in this Court compelled to accept the lands; but the other party has been left to this remedy at law. This is a very nice point, upon which I give no opinion" (*i*).

Although it is decided law, according to the cases of *Mortimer v. Capper* (*j*), and *Jackson v. Lever* (*k*), and the reported dicta of Lord Eldon, especially in the case of *Coles v. Trecothick* (*l*), that if the price of property be an annuity for the life of the vendor, his

(*f*) *Willan v. Willan*, 2 Dow. P. C. 274.

(*g*) *Chamberlain v. Lee*, 10 Sim. 444; *Eyston v. Simonds*, 1 Y. C., C. C. 608; *Hoggart v. Scott*, 1 R. & M. 293; *Salisbury v. Hatcher*, 2 Y. & C., C. C. 54, but compare *Duckle v. Baines*, 8 Sim. 526.

(*h*) 3 Sw. 108.

(*i*) 1 Jones & Latouche, 728.

(*j*) 1 B. C. C. 156.

(*k*) 3 B. C. C. 604; see *Akhurst v. Jackson*, 1 Wilson's Ch. Cases, 49.

(*l*) 9 Ves. 246; see *Davies v. Cooper*, 5 M. & C. p. 279.

death before the conveyance will form no objection to the specific performance of the contract; and the same rule applies to the case where the life annuity is not the price but the subject of sale; yet Sir John Leach, after making this observation remarks, that, "If, the death of the life annuitant were to happen at such a time that a purchaser in effect took no benefit under his contract, which might well happen when his title was to commence at a future time; it might be made a question whether, as at the time of the bill filed, a purchaser could file no bill in equity, the principle of mutual remedy could enable the vendor to file such a bill" (*m*). But the true question is, whether the agreement at the time of making it conferred a mutual remedy (*n*).

Lord Hardwicke, in *Goring v. Nash* (*o*), said,—
 "There is no instance of decreeing a partial performance of articles: the Court must decree all or none; and where some parts have appeared very unreasonable, the Courts have said, we will not do that, and therefore as we must decree all or none, the bill has been dismissed." So Lord Alvanley, in *Gibbons v. Caunt* (*p*), said, "The agreement must be binding on all the parties or none." Lord Redesdale, in the House of Lords, always maintained the same doctrine. In *Hamilton v. Grant* (*q*), he said, "The agreement was not in itself an agreement which could be specifically performed as against one of the parties, and that party had no right to specific performance against

(*m*) *Kenney v. Wenham*, 6 Mad.
355.

(*n*) See *Bower v. Cooper*, 2
Hare, 408.

(*o*) 3 Atk. 186.

(*p*) 4 Ves. 849.

(*q*) 3 Dow. P. C. 33.

the other party." And again, in *Wood v. Rowe* (r), Lord Redesdale said, "that the agreement embraced several objects; that stopping the proceedings (which had been agreed) would not execute the agreement: it will execute that one part of the agreement which provides, that the proceedings instituted in equity shall cease, but it will not execute the other part of the agreement; and, I apprehend, it is impossible to hold that any person can have a right to demand that one part of the agreement shall be executed, leaving the other part unexecuted." So Sir L. Shadwell, in *Kimberley v. Jennings* (s), says, "This agreement cannot be performed in the whole, and therefore this Court cannot perform any part of it:" a proposition to which Lord Cottenham (t) said he entirely assented, and Lord Lyndhurst (u), in another case, said, "It has been laid down again and again, and very recently in a case before Sir Edward Sugden, in *Ireland* (v), that, unless the Court can decree specific performance of the whole of a contract, it will not interfere to enforce any part of it."

But it is equally clear that this doctrine can only be applied to cases where the contract is purely executory on both sides, and not where there has been some consideration already given on the one side for the executory contract on the other. The rule is, that there must be mutuality; mutuality meaning, in the case of purely executory contracts, a mutuality of consideration capable of being enforced by the Court,

(r) 2 Bligh, P. C. 695.

(s) 6 Sim. 562.

(t) *Dietrichsen v. Cabburn*, 2 Phill. 57.

(u) *Hills v. Croll*, 2 Phill. 62.

(v) *Gervais v. Edwards*, 2 Dr. & Warr. 80. See *Rhodes v. Cook*, 2 S. & S. 488.

to which application is made to secure the performance of the contract; but, if part of the consideration has been obtained, the objection for want of mutuality does not exist. If a portion of the contract has been executed, the consideration has been in fact given, and the Court has no longer to inquire whether it could have compelled the giving of it originally.

It is of great importance to observe the distinction. Lord Cottenham, in a case before the House of Lords, points it out. He said, "In support of the third objection that there was no mutuality in the contract, some well known cases were cited; but the question here is, whether after the risk incurred and the benefit secured, and the consideration thereby paid, the father can, on his part, resist the performance of the contract which led to these results? If this objection could prevail in this case, how could decrees for specific performance where the defendant only signed the agreement, or upon part performance, be maintained? In these cases there is no mutuality in the sense in which the word is used in the present argument, because the contract being within the Statute of Frauds, could not have been originally enforced against the plaintiff; but he having performed his part, is entitled to compel the defendant to perform his" (*w*).

The same rule obtains in Courts of Law; the principle involved being a general principle of our jurisprudence. Lord Chief Justice Tindal, delivering the judgment of the Court of Common Pleas in *Arnold v. the Mayor of Poole*, said, "It was contended

(*w*) *Persse v. Persse*, 7 Cl. & Fin. 516.

that all contracts to be binding must be mutual; and that therefore, where corporations may sue upon simple contracts, it follows as a legal consequence, they may also be sued. But we think the proposition as to the necessary mutuality of contracts was stated too broadly, and that it must be confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise. The cases last cited (*x*) do not therefore shew that corporations may be sued upon parol contracts" (*y*).

In *Colombine v. Chichester*, where a solicitor had agreed to give up information and books and papers to a projected company in consideration of certain payments, on his filing a bill for specific performance, Sir L. Shadwell said, that with respect to the objection that there is no mutuality in the contract, the plaintiff has stated that he performed all he undertook to perform; and therefore the learned Judge thought there was mutuality, it being, in fact, a question of consideration (*z*).

It is the principle of mutuality which has led to the practice of compelling specific performance of contracts for sale against the purchaser; when in fact, the claim made by the bill is only the sum of money agreed to be paid. Now equity originally interfered to effect the performance of contracts, in order to give the party the actual thing contracted for, and at the instance of the purchaser; but when

(*x*) *Barber Surgeons of London v. Pilson*, 2 Lev. 252; *Dean and Chapter of Rochester v. Pierce*, 1

Campb. 466.

(*y*) 5 Scott, N. R. 776.

(*z*) 16 Law J. R., N. S., 41.

once that jurisdiction was assumed, the principle of mutuality compelled equity to assist the vendor (a).

In general the condition of mutuality is sufficiently satisfied, if there be any consideration on the one side as well as on the other; and the rule is, that in the purchase of property, inadequacy of price, unless its grossness makes it amount to fraud, is not a ground for refusing the enforcement of the contract (b). In contracts for the purchase of interests in possession, it is nothing more than an ingredient in evidence (c). It may prove that there must have been imposition or oppression (d).

But this only holds when each party has equal competence to decide the matter. If the parties are connected in a manner which gives one influence over the other, it is incumbent on the party having that influence, and obtaining the agreement to shew that the consideration was adequate; and this is the doctrine as to the sale of reversionary interests (e).

In these cases the Court refuses its assistance to enforce specifically the agreement for a sale, if there is the slightest doubt about the adequacy of the price; the purchaser is bound to prove that he gave a sum which was, at the time, an adequate price for the subject of his purchase, otherwise his bill for enforcing the contract will be dismissed.

(a) Per Sir J. Leach, V. C., *Adderley v. Dixon*, 1 S. & St. 607. See p. 612; *Withy v. Cottle*, S. & St. 174. See *Law v. Peers*, 4 Burr. 2226.

(b) *Coles v. Trecothick*, 9 Ves. 246; *Sullivan v. Jacob*, 1 Moll. 477.

(c) *Underhill v. Horwood*, 10

Ves. 219.

(d) *Bower v. Cooper*, 2 Hare, 411.

(e) *Peacock v. Evans*, 16 Ves. 517, *ante*. *Hincksman v. Smith*, 3 Russ. 433; *Aldborough v. Trye*, 7 Cl. & Fin. 36; *Edwards v. Browne*, 2 Coll. 104.

So the Court will look more narrowly into a transaction between father and son, than if it had been between strangers, and if there are other circumstances, the Court will give them full effect (*f*). In *Heron v. Heron* (*g*), Lord Hardwicke set aside a release from a son to the father, where the son was turned out of doors; left entirely destitute and void of a maintenance. His Lordship said, "Suppose the plaintiff had been entitled to a tenancy in tail of real estate, and the father, a bare tenant for life, had taken such advantage of his son's necessities to draw him to join in any conveyance which would destroy his remainder; this Court, upon very slender evidence of such a practice in a father, has relieved the son."

But, although this is the general rule as to persons having influence, yet in the case of family arrangements, other principles come in which operate in a precisely contrary way.

Lord Eldon said (*h*), "The Court will not view transactions between father and son in the light of reversionary bargains, but will regard them as family arrangements, with a reasonable degree of jealousy; and will not look into all the motives and feelings which might actuate the parties in entering into such arrangements. There may be considerations in such cases, which the Court could not possibly scan." There are two principles which are applicable to the case of family arrangements, and which are the grounds upon which the Court generally refuses to disturb them.

(*f*) Per Sir E. Sugden, C. L.;
Wallace v. Wallace, 1 Conn. & Law-
son, 495.

(*g*) 2 Atk. 161.
(*h*) *Tweddell v. Tweddell*, T. &
R. 13.

In the first place, the Court cannot weigh the considerations which really influence the conduct of the parties. The impossibility of estimating the objects generally had in view in family arrangements, has led to the exemption of such agreements from the ordinary rules which affect agreements between strangers (i).

In this respect, the consideration which supports a family arrangement is analogous to the consideration of marriage in a marriage settlement. When the provision is once made, as it has been by the marriage, no event afterwards can alter it (j). "A part of the consideration," said Lord Eldon, in *Prebble v. Boghurst* (k), "besides these pecuniary benefits is marriage. I do not apprehend that the quantum of pecuniary benefits will affect the question, and I am surprised to find observations about the amount of the penalty varying the reciprocity [7 Taunt. 543], where marriage is one of the considerations."

In the next place, a family arrangement is of the nature of a compromise, which the Court highly favours, and for the peace of society will not lightly disturb.

Where there is a dispute between parties claiming a property, the compromise of that dispute is a valid consideration for the agreement which is effected (l). Where a doubtful question arises, such as a question of construction upon the will of a testator, it is extremely reasonable that parties should terminate

(i) Per Lord Cottenham, C., in *Persse v. Persse*, 7 Cl. & Fin. 317.

(j) Per Sir W. Grant, *Nairne v. Prowse*, 6 Ves. 752; *North v. Ansell*, 2 P. W. 618; *Campion v. Cot-*

ton, 17 V. 263.

(k) 1 Sw. 319.

(l) *Naylor v. Winch*, 1 S. & St. 556.

their differences by dividing the stake between them, in the proportions which may be agreed upon.

Where a compromise of a doubtful claim is entered into fairly, and with due deliberation and upon consideration, a Court of Justice cannot inquire into the supposed adequacy or inadequacy of the consideration (*m*); in *Pickering v. Pickering*, Lord Langdale says (*n*), "Where parties, whose rights are questionable, have equal knowledge of facts and equal means of ascertaining what their rights really are, and they fairly endeavour to settle their respective claims among themselves, every Court must feel disposed to support the conclusions or agreements to which they may fairly come at the time, and that, notwithstanding the subsequent discovery of some common error." Lord Alvanley's doctrine is to the same effect, "No man can doubt that this Court will never hold parties acting upon their rights, doubts arising as to those rights, to be bound, unless they act with full knowledge of all the doubts and difficulties that arise; but if parties will, with full knowledge, act upon them, though it turns out that one gains a great advantage, if the agreement was fair and reasonable at the time, it shall be binding. There was a case before the Lord Chancellor, who spoke to me upon it, in which it was held, that the Court will enforce such an agreement, though it turns out that the parties were mistaken in point of law; even, supposing counsel's opinion was wrong" (*o*). So Lord Gifford, M. R., "If the claim were fairly and *bonâ fide* made against

(*m*) Per Sir J. Leach, V. C.,
Nayler v. Winch, *ubi sup.*

(*n*) 2 Beav. 31.
(*o*) *Gibbons v. Caunt*, 4 Ves. 849.

W.; and if W., after due consideration, not only admits his liability, but compromises the claim, and for that purpose, enters into an agreement; the compromise of such a claim entered into with due deliberation, even if it were doubtful whether the claim was such as could have been made effectual, is a sufficient consideration, both at law and in equity, for such an agreement" (*p*).

Neither mistake nor want of mutuality are allowed to prevent agreements for a compromise, between members of the same family from being conclusive. "Where family arrangements," says Lord Eldon, "have been fairly entered into without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then, although, the parties may have greatly misunderstood their situation and mistaken their rights, a Court of Equity will not disturb the quiet, which is the consequence of that agreement;" and he afterwards, in the same case stated, in effect, that a family agreement may bind the parties, though neither of them had a valid title to the property in question (*q*). But there must not only be good faith and honest intention, but full disclosure; and without full disclosure, honest intention is not sufficient (*r*).

The strong leaning of the Court in favour of family arrangements is very well illustrated by the language of Lord Brougham, C., in deciding the case of *Clifton v. Cockburn*. He said, "It is not necessary to go so far

(*p*) *Attwood v. —* 1 Russ. 400; see p. 463.
358.

(*r*) Per Lord Eldon, 3 Swan.
(*q*) *Gordon v. Gordon*, 3 Swan. 477.

as was done in *Cory v. Cory* (*s*), where a compromise, made under the influence of intoxication, was supported by Lord Hardwicke, as tending to settle family differences, or in older cases, where parental influence directly exerted, was held insufficient to set aside, what was done under such pressure. The more moderate view of the subject, taken in later instances, such as *Stockley v. Stockley* (*t*), is enough to bear out the only proposition I have any occasion here to maintain, that a construction far from being plainly and grossly erroneous, imposed upon a clause in a family settlement, ought not, if acted on by the makers of that settlement, to be disturbed by this Court after their decease" (*u*).

(*s*) 1 Ves. sen. 19.
(*t*) 1 V. & B. 30.

(*u*) *Clifton v. Cockburn*, 3 M. & K. 76 ; see p. 100.

CHAPTER VI.

The Contract must be properly proved.

ALL agreements, in order to be executed in a Court of Equity, must be proved in such manner as the law requires (a).

Agreements relating to land must, in order to be valid at law according to the Statute of Frauds (b), be in writing, and signed by the party. The Statute of Frauds introduced no new rule into the practice of Courts of Equity respecting agreements relating to land; equity having always refused to perform such agreements, unless proved by written evidence.

Lord Ellesmere said, "That he neither would help leases parol in Chancery, and that it was good for the commonwealth, if no lease parol were allowed by the law, nor promises to be proved by witnesses, considering the plenty of witnesses now-a-days, which were *testes diabolices, qui magis fame quam fama moventur*" (c). So Lord Bacon's 15th Order, directs all suits grounded upon wills nuncupative, or leases parol to be dismissed upon motion, and Lord Keeper Bridgman, in 1668, said, "A personal promise is not

(a) Per Lord Rosslyn, C., in *Lord Walpole v. Lord Orford*, 3 Ves. 420.

(b) 29 Car. 2, c. 3.

(c) 8 June, 1 Jac. 1; Cary, 39.

sufficient to decree any lands without other circumstances" (*d*).

But agreements respecting personalty were binding at law, though not in writing, and were valid in equity; with respect to such agreements, the 17th section of the statute enacts that no contract for the sale of any goods, wares, or merchandizes for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties, to be charged by such contract or their agents thereunto lawfully authorized.

In *Colt v. Netterville* (*e*), the bill was for a specific performance of an agreement for transferring some York buildings' stock, and it was argued, that York buildings and other stocks were within the words and meaning of this section of the Statute of Frauds. Lord King, C., said, "This question was before all the Judges of England, who were equally divided upon it, six against six, and therefore it is a point too difficult for me to determine upon a demurrer."

In *Duncuft v. Albrecht* (*f*), Sir L. Shadwell, V. C., held that a parol agreement for the sale of railway shares is binding; and as to the objection that this was a case within the 17th section of the statute, he said, "It is impressed upon my mind that in the

(*d*) Praxis, Cancell. ed. 1704, vol. 1, p. 423.

(*e*) 2 P. W. 303.

(*f*) 12 Sim. 189. An agree-

ment to leave money by will need not be in writing. *Fenton v. Embless*, 3 Bur. 1270.

decisions which have been made with respect to the 17th section, it has been held to apply only to goods, wares and merchandizes, which are capable of being in part delivered. If there is an agreement to sell a quantity of tallow or of hemp, you may deliver a part; but the delivery of a part is not a transaction applicable, as I apprehend, to such a subject as railway shares. They have been decided not to be land. They have been decided to be, in effect, personal estate; but not personal estate of the quality of goods, wares and merchandizes within the meaning of the 17th section."

The cases on the subject of interests in land, which have been held to be within the fourth section, and of which the most important as regards any likelihood of attempting to enforce the contract in equity, is the case of growing timber, are collected by Sir Edward Sugden (*g*).

In the case of *Boyce v. Green*, it was held that a share in a mining company was within the statute; the mining company being engaged in a partnership in interests in or concerning lands. The Court of Queen's Bench held that a purchaser of a share acquires, and would be entitled, on the dissolution of the company, to a share in those houses and interests in lands which the company had acquired (*h*).

But this decision is opposed to a class of recent decisions upon an analogous subject. The Statute of Mortmain prohibits the giving any interest in lands to a charitable use (*i*); as the Statute of Frauds (*j*)

(*g*) V. & P. 99; *Scorell v. Boxal*,
1 You. & Jerv. 396.
(*h*) *Batty*, 608.

(*i*) 9 Geo. 2, c. 36, sec. 3.
(*j*) 29 Car. 2, c. 3, sec. 4.

directs that any contract concerning an interest in lands shall be in writing: these cases have decided that a share in a joint stock or trading company, having interests in lands, is not within the Statute of Mortmain; and Lord Langdale, M. R., said, "If, upon a dissolution or determination of the joint concern, a shareholder shall become an owner of any part of the land, it is only upon a new transaction, and by acquiring a new title and right as purchaser" (*k*).

The learning on the subject of the Statute of Frauds is so fully detailed in Sir Edward Sugden's work, that it need not here be gone into.

But Equity does not only admit the proof of positive agreements in terms, as an agreement to do or not to do a particular thing, but it also considers an agreement is sufficiently proved by the production of what, although not amounting to an agreement in terms, yet is evidence that the parties came to an agreement. Equity which adverts to the substantial object of all contracts, independent of the forms which they assume, gives effect to the intent of the parties.

It is clear that any kind of written contract, if it express the intent of the parties to stipulate with a view to some particular thing apparently collateral to the contract itself, will in equity amount to an agreement respecting that thing, although, in form, it assume a different character.

Thus, where the condition of a bond was "in consideration of so much money in hand paid to convey and assure certain lands," the Master of the Rolls

(*k*) *Sparling v. Parker*, 16 Law J., N. S., Eq., 57; *March v. Attorney General*, 5 Beav. 433;

Thompson v. Thompson, 1 Coll. 380.

declared, that bonds of this nature were always considered in equity as articles of agreement, and decreed the condition to be specifically performed (*l*).

Thus, on a bond given before marriage by the wife to the husband, conditioned to convey her lands upon the marriage to him and his heirs, the Court would not allow the objection, that the bond became void by the intermarriage; the impropriety of the security, or the inaccurate wording of it, is not material; for it is sufficient that the bond is a written evidence of the agreement of the parties, that the husband, in consideration of marriage, should have the land as her portion (*m*).

Lord Plunkett, in *Logan v. Wienholt*, said, "It is not immaterial to the argument, that this bill is filed not upon any admitted legal right on which a party could proceed in a Court of Law; but it is founded on what is undoubtedly an equitable right to have a specific execution of the agreement implied in the bond, according to the true and just and reasonable construction of the words" (*n*).

In *ex parte Hodgson* there was a bond given by the husband on marriage, on account of his receipt of the wife's fortune, which was to be proved upon in the case of his bankruptcy. Lord Eldon said, "I look upon this as a marriage agreement, that the property of the wife, payable on her marriage, and to which she might become entitled from her father, was what the husband was to have the use of until his bankruptcy or insol-

(*l*) Powell on Contracts, 314;
Anon. Mosely, 37.

(*m*) *Cannel v. Buckle*, 2 P. W.
243.

(*n*) 1 Cl. & Fin. 611.

vency. * * * Though in form a bond, it is an agreement as to her estate, that it shall be enjoyed by her husband till he becomes bankrupt" (o).

Sir James Wigram, V. C., says, "I accede to the plaintiff's argument, that where there is, as in this case there clearly is, a good consideration for the lien, it is immaterial what may be the form of the transaction. It is only necessary that, the transaction should be evidence of an agreement for a lien: the real nature of the transaction, and not the mere form of it, must, I apprehend, be regarded" (p).

So in *Spencer v. Boyes*, where a party had conveyed copyhold property by lease and release, and had covenanted for further assurance after his death, it descended to his youngest son, Lord Alvanley said, "I am clearly of opinion that this covenant is a contract for valuable consideration affecting the land, and will affect the heir," and this, although the copyhold estate could not be affected by the covenant in an action at law, not being assets (q).

So Sir Edward Sugden, C. I., in *Averall v. Wade*, said, that a covenant that an estate is free from incumbrances, will give power to the covenantee to come into a Court of Equity, and claim any charges upon his and another estate to be thrown entirely on the other estate (r).

Thus also, acts of Parliament for carrying undertakings into effect are considered as a species of

(o) 19 Ves. 208.

(p) *Malcolm v. Scott*, 3 Hare, 52; see *Burn v. Carvalho*, 4 M. & C. 690.

(q) 4 Ves. 370; *Aldrich v. Cooper*, 8 Ves. 388, 394.

(r) *Ll. & Goold, R. t. Sugden* 259-60.

contract between the public and the undertakers of the work (*s*).

In *Blackmore v. The Glamorganshire Canal Company*, Lord Eldon, C., said, "I follow and adopt the expression of the Lord Chief Justice of the King's Bench, and I am glad to fasten myself in some measure on his great authority, and say that, when I look upon these acts of Parliament, I regard them all in the light of contracts made by the Legislature, on behalf of every person interested in anything to be done under them, and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such acts of Parliament have now become extremely numerous, and from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament, do, in effect, undertake that they shall do and submit to whatever the Legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and shall forbear all that are thereby required to do, and to forbear as well with reference to the interests of the public, as with reference to the interests of individuals" (*t*).

Even at law, an instrument in terms intending to be a conveyance of lands, but which not being by deed, cannot operate as such, has effect as an agreement (*u*). In *Leader v. Ahearnes* (*v*), a deed of

(*s*) *Att. Gen. v. Brown*, 1 Swan. 265; *Gray v. Chaplin*, 2 S. & S. 267.

(*t*) 1 M. & K. 162-3.

(*u*) *Rex v. Ridgwell*, 6 B. & C. 665.

(*v*) 4 Dr. & W. 495.

conveyance was held only to amount to articles of agreement; the fair construction of the transaction being, that it was not intended to be considered as a conveyance; and as the purchaser, by his conduct, requiring an indemnity for which he had not stipulated, frustrated the whole object, Sir E. Sugden, C. I., held that the seller was at liberty to treat the transaction as incomplete, and to enter into a new contract of sale with another party.

If a writing amounts to a present assignment of a lease, yet if it appeared from it, that a further instrument was necessary to carry the intention of the parties into effect, a Court of Equity would not refuse relief to a party seeking its aid in that respect (*w*).

But agreements are also sufficiently proved in equity by proof of acts of a party which can only be explained by reference to an agreement; and which are therefore considered by the Court as equivalent to the actual making of the agreement by the party: and in such a case, although the agreement be not in writing, yet if it would be a breach of good faith on the part of the contracting party, and an injury to the party with whom he contracted, not to enforce it, the objection that it is not proved, according to the provisions of the Statute of Frauds, will have no weight.

Where an agreement is put into writing, but not signed by the party, yet if his acts are clearly referrible to an agreement, he is held to have adopted it and to be bound by it. Thus a party taking possession under a lease or an assignment of a lease, is

(*w*) *Fenner v. Hepburn*, 2 Y. & C., C. C. 159.

held bound by the covenants of the lease (*x*). So in the case of *Lord Montfort v. Lord Cadogan*, the trustees of Lord Cadogan's settlement, whose duty it was to renew an Ecclesiastical lease, did not execute the settlement, but they acted under the trust. Sir Wm. Grant considered that they and their assets were bound to make good the deficiency from their having neglected to renew. Lord Eldon remarked, "It is said the trustees are not under covenant; and they are not bound under hand and seal; but they have in equity undertaken to execute the trusts, exactly as if they had so executed the instrument; and the general words, 'It is declared and agreed,' amount to a covenant" (*y*).

So again, Lord Brougham, C., in extending the case of obligation from a covenant to that imposed by a private act of Parliament, under which the party acted, said, "What does it signify whether the obligation arises out of a covenant or under the provisions of a statute?" (*z*)

If a man makes a representation to another, and upon the faith of that representation, the other does certain acts which he otherwise would not have done; so that in effect there is an agreement between the parties, to which these acts are referrible: the Court will not allow the defence of the Statute of Frauds to be set up to enable the defendant to resist the performance of what he represented to the other and agreed that he would do.

Lord Hardwicke said, "If there is a declaration

(*x*) *Wilkins v. Fry*, 1 Mer. 244.
(*y*) 17 Ves. 185; 19 Ves. 635.

(*z*) *Tubbs v. Broadwood*, 2 R. & M. 487.

and undertaking by a legatee to do an act, in consideration of the testator's devising to that legatee, I know no case where the Court has not decreed it, whether such an undertaking was before the will has been made or after" (a).

If one on his death bed, expresses a desire to give a legacy, and the residuary legatee tells him it is unnecessary to be at that trouble, as he will take care to have it paid; upon a bill filed for the money, it will be ordered to be paid, in respect of the fraud upon the intended legatee (b). But in *Barrow v. Greenough* (c), where the executor promised the testator that an increased provision should be given to a legatee, and the testator refused to make a new will, saying he would leave the same to the executor's (who was also residuary legatee) generosity, and the executor having, in his own handwriting, stated the conversation, Lord Alvanley, M. R., decreed payment, but said if it had not been for the written paper, he should have hesitated very much in admitting evidence against a written will.

In *Strickland v. Aldridge* (d), a bill was filed by a heir-at-law against a devisee, alleging the devise was upon a secret trust for charitable purposes, and void under the statute 9 Geo. 2, c. 36. The defendant pleaded the Statute of Frauds. Lord Eldon said, "The statute was never permitted to be a cover for fraud upon the private rights of individuals; and

(a) *Drakeford v. Wilks*, 3 Atk. 539. See observations of Lord Cottenham, C., in *Hill v. Gomme*, 5 M. & C. 250. See p. 255.

(b) See *Chamberlain v. Agar*, 2 V. & B. 262; *Reech v. Kennegate*,

Amb. 67. The cases are collected in *Podmore v. Gunning*, 7 Sim.

644. See 7 Bligh's Rep. 53.

(c) 3 Ves. 158.

(d) 9 Ves. 516.

though within the intention, it cannot be said a trust is declared under the circumstances, it is clear, a trust would be created upon the principle in which this Court acts as to fraud. In the ordinary case of an estate suffered to descend, the owner being informed by the heir, that if the estate is permitted to descend, he will make a provision for the mother, wife or other person, there is no doubt this Court would compel the heir to discover whether he did make such promise. So, if a father devises to his youngest son, who promises that if the estate is devised to him he will pay £10,000 to the eldest son, this Court would compel the former to discover, whether that passed in parol; and if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of £10,000; and then why, upon a similar principle, should not a trust be raised as to the whole value of the estate, the promise extending to the whole?"

In *Harrison v. Gardner* (e), where a sum was paid for the goodwill of a trade, on an understanding proved by parol evidence, that the partner selling the goodwill should not carry on the same trade in the same street; an injunction was granted to restrain him from opening a shop in that street. The Vice Chancellor saying, "The ground on which I decide this case is, upon the good faith and understanding when this money was awarded to the defendant for the goodwill, that he would not carry on the trade in Fore-street or its vicinity, which good faith and

(e) 2 Madd. 198.

understanding was the occasion that the award was silent upon the subject."

Lord Cottenham, C., in his judgment in the case of *Baron de Biel v. Hammersley*, said, "A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of this Court, for the purpose of realizing such representation. Of this, *Hodgson v. Hutchinson* (*f*), *Cookes v. Mascal* (*g*), and *Wankford v. Fotherby* (*h*), which last case was affirmed by the House of Lords, afford strong instances. In *Luders v. Anstey* (*i*), a suggestion for consideration, followed by marriage, was held to be binding" (*j*).

A party will be bound to make good a representation as to his daughter's fortune to her intended husband (*k*).

In *ex parte Gardner*, the settlement made previously to the marriage of the bankrupt, recited that £500 of his money should be placed in settlement; the representation of his circumstances made by the settlement was unfounded, and the money was never paid to the trustees, but Lord Eldon, on a petition of the wife in the bankruptcy, said that the husband was bound to make good the representation by his marriage settlement; and he made an order, directing it to be recited, that it appeared the representation by

(*f*) 5 Vin. Abr. 522.

(*g*) 2 Vern. 200, said not to be law.

(*h*) 2 Vern. 322.

(*i*) 4 Ves. 501.

(*j*) 12 Cl. & Fin. 62. See *Montgomery v. Reilly*, 1 Bligh, 364,

N. S.; *Randall v. Morgan*, 12 Ves. 67; *Maunsell v. White*, 1 Jones and Latouche, 539.

(*k*) *Landon v. Morris*, 5 Sim. 247; *De Manneville v. Crompton*, 1 V. & B. 356.

the settlement was false at the time it was made; and the marriage being had upon the faith of that representation, he decided that the petitioner was a creditor for £500 (*l*).

In contracts of marriage, it is a principle of universal application that faith in such matters is so essential to the happiness, both of parents and children, that whoever treats fraudulently on such an occasion, shall, not only not gain, but even lose by it. If any man, upon a treaty for any contract, will make a false representation, by means of which he puts the person bargaining under a mistake upon the terms of bargain, it is a fraud; it misleads the parties contracting on the subject of the contract (*m*). Therefore any party making a representation on a marriage, will be kept to it; no underhand agreements will be allowed to be executed: and the circumstance that the husband is a party to the deceit put upon the lady and her friends, makes no difference, nor will he be allowed to suffer, as whatever is taken from him during coverture, is taken from her (*n*).

A recital that land covenanted to be settled were of a certain value in a marriage settlement, has been held sufficient to induce the Court to order them to be made up to that value (*o*).

The circumstance of marriage following such representations directly, has been considered sufficient evidence that the marriage was upon the faith of the

(*l*) 11 Ves. 40. See *Dundas v. Dutens*, 1 Ves. Jun. 196; *ex parte Carr*, 3 V. & B. 111; *Landon v. Morris*, 5 Sim. 247; *De Manneville v. Crompton*, 1 V. & B. 356.

(*m*) *Neville v. Wilkinson*, 1 B.

C. C. 547.

(*n*) Per Lord Redesdale, *Williamson v. Gibson*, 2 S. & L. 362.

(*o*) *Gleg v. Gleg*, 1728; Vin. Abr. 5, 506.

representation, and if the husband make a proposal for a settlement and the marriage follow, he will be bound by it (*p*); and this was held when such proposal was made to obtain a marriage with consent, and the marriage was celebrated without consent; and, as respects the property of a Ward when the proposals were made to the Court of Chancery, and the marriage took place when the ward was of age (*q*).

In *Denton v. Davis*, the tenant in tail sold a portion of the settled estates under a power of sale and exchange, and represented to the solicitor for the purchasers of some part of the settled estates, that he had purchased and settled other estates, in lieu of those sold. He had, in fact, purchased other estates, but before the settled estates were sold. On a bill filed by his daughter and her husband, claiming the settlement of the purchased estates, Sir Wm. Grant thought that no intention or agreement that they should be taken, could be proved. "The letter to the solicitor was no acknowledgment of a trust. It was a false assertion, that the estates were actually settled in lieu and exoneration of the estates sold; and that representation was made to a third person, and not to the plaintiffs. If those representations had been made to the plaintiffs, and they had married upon the faith of them, the Court would, I apprehend, have compelled the defendant to make that settlement, which he pretended he had already made or was about to make. Whether a party coming to the

(*p*) *Luders v. Anstey*, 4 Ves. 501.

(*q*) *Cooke v. Fryer*, 1 Hare, 501; *Hobson v. Ferraby*, 2 Coll.

419. See *Austen v. Halsey*, 2 S. & S. 123 (a); 4 Sim. 538; *Russell v. Nicholls*, 16 Law J. Rep. (N. S.) Chan. 46; 11 Bligh, N. S. 104.

knowledge of a representation, not made to him, or with any view to deceive him, but to which he gave credit, and upon the faith of which he acted, would be entitled to relief against the person, by whom that representation was made, it is unnecessary to discuss, as it is not alleged that the marriage was contracted under any persuasion, that the purchased estates were settled or intended to be settled to the same uses, as those which had been sold" (r).

"It is a very old head of equity, that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false" (s), and Sir Wm. Grant, in *Burrowes v. Lock* (t), after referring to these expressions of Lord Eldon, proceeds thus, "In this case the plaintiff was going to deal with Cartwright upon a matter of interest, and applied to the person qualified to give information, the trustee, to know what Cartwright was entitled to; who told the plaintiff expressly, that Cartwright was entitled to £288, and had an undoubted right to make an assignment to that extent; knowing that he had not a right to make such assignment, having previously agreed to give another person ten per cent. out of the fund. There is, therefore a concurrence of all the circumstances which the Lord Chancellor thinks requisite to raise the equity. The excuse alleged by the trustee is, that, though he had received information of the fact, he did not at that time recollect it. But what can the plaintiff do

(r) 18 Ves. 499.

Bicknell, 6 Ves. 174.

(s) Lord Eldon, in *Evans v.*

(t) 10 Ves. 475—476.

to make out a case of this land, but shew, first, that the fact as represented is false; secondly, that the person making the representation had a knowledge of the fact contrary to it. The plaintiff cannot dive into the secret recesses of his heart, so as to know whether he did or did not recollect the fact; and it is no excuse to say he did not recollect it. At least, it was gross negligence to take upon him to aver, positively and distinctly, that Cartwright was entitled to the whole fund, without giving himself the trouble to recollect whether the fact were so or not, without thinking upon the subject" (u).

It is this which constitutes the difference between the rules of law and equity in this matter; a man making a representation upon the faith of which another man does an act, can compel the other party, though he made that representation innocently, to make it good by a bill in equity; it is a fraud, and the species of fraud upon which equity founds its jurisdiction in cases of specific performance; but at law, the doctrine is much more narrow. In *Polhill v. Walter* (v), it was held that the making of a representation which a party knows to be untrue, and which is intended, or is calculated from the mode in which it is made to induce another to act on the faith of it, so that he may incur damage, is a fraud at law; so that unless it is made falsely and intentionally so, the representation is not a ground for an action at law.

The principle of equity is that when a person has

(u) Quoted by Vice Chancellor Knight Bruce in *Gibson v. D'Este*, 2 Y. & C., C. C. 576.

(v) 3 B. & Ad. 123. *Foster v. Charles*, 7 Bing. 106.

tacitly encouraged the act being done, or has consented to it, he shall not exercise his legal right in opposition to that consent. "There was a case," said Lord Rosslyn, "I do not know whether it came to a decree against Mr. George Clavering, in which some person was carrying a project of a colliery; and had sunk a shaft at a considerable expense. Mr. Clavering saw the thing going on; and in the execution of that plan, it was very clear the colliery was not worth a farthing without a road over his ground, and when the work was begun, he said he would not give the road. The end of it was, that he was made sensible, I do not know whether by a decree or not, that he was to give the road at a fair value" (*w*). So in *Jackson v. Cator*, a landlord having consented to a plan for the improvement of grounds, was not allowed to cut down ornamental timber during the term (*x*). So acceptance of rent from the lessee, under a lease by tenant for life not according to his power, by the remainderman in tail having notice, binds him not to controvert the lease (*y*). So in *Teasdale v. Teasdale*, Lord King, C., postponed the title of the father to that of his son's widow, upon the ground of the father having allowed and witnessed the settlement made by the son on his marriage under the notion that he (the son) was tenant in fee, whereas he proved to be only tenant for life, with remainder to the father in fee (*z*).

If a man has a legal claim on a property, and actively interferes in the disposition of it, he shall not be permitted to insist on his legal right; such a con-

(*w*) 5 Ves. 690.

(*x*) 5 Ves. 688.

(*y*) *Stiles v. Cowper*, 3 Atk.

692.

(*z*) *Sel. Ca.*, Ch. 59.

currence in dealing with the property is looked upon as a waiver of his interest (a). It seems admitted that if that claim is one which is only to be enforced in equity, it is not necessary that he should be active in promoting the transaction, if it appears that notice was given to him, or that it could not be done without his knowledge he shall be postponed: this is the doctrine of *Savage v. Foster* (b), and was followed by Sir L. Shadwell in *Govett v. Richmond* (c), Sir Edward Sugden, C. I., in speaking of this case, says, "The cases are very strong upon this point, *Govett v. Richmond* is one of the strongest of them; but it was decided upon a right principle. Bignold claimed under Richmond, but the contract between them rested in fieri; he knew that the plaintiff and Richmond had agreed to put an end to Richmond's interest in the property, and that they were referring the question of compensation to arbitration, and notwithstanding his knowledge of those facts, he was silent as to the nature of his claim. He suffered the plaintiff to proceed in the arbitration under the full assurance that he was to get the entire interest in the lease" (d). Sir L. Shadwell said, that where a person having a claim upon property which is the subject of a reference, knows that the arbitration is going on, but does not bring forward his claim, he is bound by the award, and declared that the plaintiff was entitled to a specific performance of the award against both Richmond and Bignold; Sir E. Sugden says, "I should be very

(a) *Mocatta v. Murgatroyd*, 1 P. W. 393; *Evans v. Bicknell*, 6 Ves. 174.

(b) 9 Mod. 36.

(c) 7 Sim. 1.

(d) *Boyd v. Belton*, 1 Jones & Lat. 770.

cautious before I laid it down that mere silence, when the party was not brought into contact with the persons engaged in the transaction, or called upon to speak, was a waiver of his right," but this case establishes that if an equitable incumbrancer has notice, he is called upon to speak (*e*).

Lord Cottenham, C., seems to apply the rule to legal and equitable claims, saying: "A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derives no benefit from the transaction" (*e*). And on another occasion, "There certainly are cases in which a party, having an equity, loses that equity, as against another person, by permitting him to go on dealing with property in ignorance of such equity. In the case of *Jones v. the Royal Canal Company* (*f*), Lord Manners went to this extent. He held that it was the duty of a party, seeing a nuisance in progress, to give notice to the party erecting the nuisance of his intention to object. Certainly, it is a different question whether such an omission would give the adverse party an equity to prevent the party, concealing his right or apparently acquiescing in the nuisance, from asserting his title at law to compensation for the nuisance when effected. But there are two cases in which that has been done: I mean the case of the watercourse, and that of *Short v. Taylor*, both reported in 2 Equity Cases, abridged, 522, where injunctions were granted to stay actions

(*e*) *Nicholson v. Hooper*, 4 M. & C. 186.

(*f*) 2 Molloy, 319.

for nuisances, because the plaintiff at law had encouraged them. That is the term used by the Court. I think it is impossible, after those two cases, to say that a party may not so encourage that which he afterwards complains of as a nuisance, as not only to preclude him from complaining of it in this Court, but to give the adverse party a right to the interposition of this Court in the event of his complaining of the nuisance at law" (*f*).

If a man, supposing he has a lease, makes improvements, the owner seeing them and knowing the misconception, will be bound to grant a lease. An agreement will be implied from his conduct. If a man builds on another man's ground, under the influence of mistake, and the owner does not advertise him, he will be bound. If a landlord enters into an arrangement with a tenant relative to improvements, and so completely sanctions them, as himself to agree to advance part of the money, implying that another part is to be in advance by the tenant, an equity fastens upon the landlord, precluding him, when these improvements are made under his authority, from saying, there is an end of the lease. Such an arrangement, though without a specific agreement, would imply one.

Lord Hardwicke, in *East India Company v. Vincent*, applies this doctrine to a public company:—"When an agent of the East India Company is in treaty with an owner of ground for a liberty for the company to build, and the owner at the time of the treaty, in consideration of his consent, insists upon terms, to which the agent makes no answer or ob-

(*f*) *Williams v. Earl of Jersey*, C. & P. 97.

jection, but immediately afterwards the company think proper to build, the silence of the agent shall be construed an acquiescence under the proposal of the owner of the ground, and shall bind the company his principals, as being, in the consideration of this Court, the agreement of the agent" (*g*).

It has been said that the Court will interfere to restrain the exercise of a legal right, on the ground of the party having permitted another person to expend money upon an object inconsistent with such right (*h*), only when there is some privity between the parties, as that of landlord or tenant, or principal or agent; but there appears to be no authority for such an opinion, and Lord Cottenham seems to have held the contrary (*i*).

If, in consequence of fraud, the provisions of the Statute of Frauds have not been complied with, the agreement will be exempted from the operation of the statute, and allowed to be proved by parol evidence (*j*).

If, through the fraud of one party, the agreement is not put in writing, it will be considered as not within the statute. It seems that Lord Thurlow thought that a defendant's saying his word should be as good as any security he could give, might take the case out of the statute: but Lord Redesdale said, he could not agree to that doctrine, that it must mean, I will not bind myself, but you shall rely on my word (*k*).

(*g*) 2 Atk. 83; but see *Macher v. the Foundling Hospital*, 1 V. & B. 188.

(*h*) *Lord Cawdor v. Lewis*, 1 Y. & C. 427.

(*i*) *Williams v. Lord Jersey*, Cr. & Ph. 95.

(*j*) See note to *Pym v. Blackburn*, 3 Ves. 38, and cases there cited.

(*k*) *Whitchurch v. Bevis*, 2 Bro. C. C. 565, and 3 Bro. C. C. 320; 1 S. & L. 34.

In *Pember v. Mathers*, it being found by an issue that, in consideration of the assignment of a lease, the defendant engaged with the plaintiff to enter into a bond to indemnify the plaintiff from the rent and covenants upon a bill brought for the specific performance of this promise, which was not in writing. Lord Thurlow decreed a specific performance, saying, that the rule of law that parol evidence cannot be admitted to increase or diminish a written agreement was right, but where the objection was originally made and promised by the other party to be rectified, it comes among the cases where it is considered as a fraud upon the rule of law (*l*). Sir W. Grant, in mentioning this case, declined saying how far it would be proper to go the whole length of it, and on the ground of such a promise to decree a specific performance (*m*).

The principle of the cases upon part performance is this: that when there has been an act done by one party clearly referrible to an agreement, and it would be a fraud on the other, after such an act done, not to have the contract performed, it shall be enforced; but the act must only admit of explanation by reference to the contract. "It is in general of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract, (delivery of possession is a common example of this). One man,

(*l*) 1 Bro. C. C. 54. Such an inquiry as to a parol agreement was directed in *Van v. Corpe*, 2 M. & K. 277.
 (*m*) *Clarke v. Grant*, 14 Ves. 520.

without being amenable to the charge of trespass, is found in the possession of another man's land; such a state of things is considered as shewing, unequivocally, that some contract has taken place between the litigant parties, and it has therefore, upon that specific ground, been admitted to be an act of part performance (*m*).

If the defendant has concurred in a material unequivocal act, by which he has attained a substantial part of his object, he shall not be allowed to retract, and the plaintiff has a right to the full execution of the contract (*n*). A part performance, which is to be binding, is an act unequivocally referring to, and resulting from, the agreement; and such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement (*o*), a party, who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed (*p*).

The reader will find a full account of the cases on part performance of the contracts for sale of estates in Sir Edward Sugden's treatise on Vendors.

A very difficult class of cases are those in which acts done by a tenant are considered as referrible to an agreement between him and his landlord for an extension of the lease (*q*). In a case of *Mundy v.*

(*m*) Per V. C. Wigram, in *Dale v. Hamilton*, 5 Hare, 369.

(*n*) *Wills v. Stradling*, 3 Ves. 378.

(*o*) Sir W. Grant, M. R. in *Frame v. Dawson*, 14 Ves. 386.

(*p*) *Morphett v. Jones*, 1 Swans-

ton, 181.

(*q*) *Sutherland v. Briggs*, 1 Hare, 26; *Dowell v. Dew*, 1 Y. & C., C. C. 345. *Pilling v. Armitage*, 12 Ves. 78; *Gregory v. Mighell*, 18 Ves. 330; *Frame v. Dawson*; *Morphett v. Jones*.

Jolliffe (*r*), the expenditure by the tenant was in draining the land, and the Court directed Mr. Jolliffe to grant him a lease, upon the promise of which it was said the expense of draining had been incurred.

There are cases that acts done by a defendant can be made a ground for compelling him to perform the agreement (*s*).

Although it is perfectly true that the Court will not permit a man, knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; yet in this case, and in the case of part performance of an express, though parol agreement, the evidence must be strong and cogent, so as to leave no reasonable doubt that the party acted upon this sort of encouragement, or upon the faith of an agreement (*t*).

There is a growing reluctance to carry parol agreements into execution, on the ground of part performance, where the terms do not distinctly appear, and although, according to many authorities, the mere circumstance of the terms not appearing, or being controverted by the parties, will not, of itself deter the Court from taking the best measures to ascertain the real terms (*v*); yet the prevailing opinion requires the party seeking the specific performance in such a case to shew the distinct terms and nature of the contract (*w*).

It often happens that the circumstance relied on as

(*r*) 5 M. & C. 167.

(*s*) Sir William Grant in *Buckmaster v. Harrop*, 7 Ves. 347; *Whaley v. Bagenal*, 6 B. P. C. 45.

(*t*) *Dunn v. Spurrier*, 7 Ves.

231.

(*v*) *Savage v. Carroll*, 2 Ball & Beatty, 444; *Mundy v. Jolliffe*, 5 M. & C. 167.

(*w*) *Sugden V. & P.* 150.

part performance, is one which is referrible to the agreement alleged by the plaintiff, and also to a different agreement alleged by the defendant. Thus in *Boardman v. Mostyn* (x), a bill for the specific performance of a parol agreement for a lease, where the part performance relied on was the entering into possession; the defendant admitted that the plaintiff had entered into possession in pursuance of an agreement, not, however, the agreement stated in the bill, but a different agreement set forth in his answer. The question was whether this admission took the case out of the statute. Lord Eldon observed, "It is said, that if the defendant admits, that possession was taken in pursuance of the agreement, that takes it out of the statute. That it may have that effect in cases where it appears what the agreement was, may be clear; but, *non constat*, that it has where that does not appear. At the same time, unquestionably the Court has gone a great way upon that. In a case that came from Malton in Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, Lord Thurlow thought proper to send it to the Master, upon the ground of the possession being delivered, to inquire what the agreement was. The difficulty there was in ascertaining that. The Master decided as well as he could; and then the cause came before Lord Rosslyn upon further directions, who certainly seemed to think Lord Thurlow had gone a great way, and either drove them to a compromise, or refused to go on with the decree upon the principle on which it was made."

(x) 6 Vesey, 467.

It is clear that the part performance of one of the terms of an agreement, although it dispenses with the necessity of the agreement being in writing, yet, by introducing all the uncertainty produced by parol evidence, may very frequently render it impossible to obtain specific performance.

If there is a parol agreement for a settlement upon marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner, unless there has been a fraud upon the wife, against which the Court will relieve (*y*). It seems a parol agreement before marriage, if followed by a post-nuptial settlement, in which it is recited, is sufficient to take away the voluntary character of the post-nuptial settlement (*z*).

Another case in which parol agreements made concerning land are considered binding, is when the land is partnership property. Where a partnership, or an agreement in the nature of partnership, exists between two persons, and land is acquired by the partnership as a substratum of such partnership, the land is in the nature of the stock-in-trade of the partnership; and the partnership being proved as an independent fact, the Court, without regarding the Statute of Frauds, will inquire of what the partnership stock consisted, whether that stock be land or of any other nature (*a*).

It is the familiar doctrine of the Court that parol evidence may be used to rebut an equity (*b*). The law recognizes only two kinds of contracts; namely,

(*y*) Per Lord Thurlow, *Dundas v. Dutens*, 1 Ves. jun. 196.

(*z*) *Randall v. Morgan*, 12 Ves. 67; *De Beil v. Thomson*, 3 B. 269, S. C.; 12 Cl. & Fin. 63; *Mon-*

tacute v. Maxwell, 1 P. W. 608.

(*a*) *Dale v. Hamilton*, 5 Hare, 369.

(*b*) *Squire v. Campbell*, 1 M. & C. 480.

contracts under seal, and parol contracts, the latter branch comprehending those that are in writing, as well as those that are merely verbal. Originally, before the Statute of Frauds, all parol contracts, whether written or verbal, were of equally high authority, and the preference must have depended simply on the dates. Now the words of the statute are only negative; a verbal contract cannot now support an action or suit; but for every other purpose it remains the same as before. It may be used for defensive purposes, and a Court of Equity still considers it as equally binding on the conscience of the parties (*c*).

But the exclusion of parol evidence to vary a written contract concerning land is adopted upon two distinct grounds; not simply as being in direct opposition to the Statute of Frauds, but also upon the general rules of evidence independent of that statute. The writing must speak for itself, and can receive no aid from extrinsic evidence of this more loose and unsatisfactory nature. That which is the rule of law prevails equally in Courts of Equity, which admit no different rule of evidence upon this subject (*d*). Thus, where two distinct and several agreements, for the sale and purchase of two estates belonging to two persons, were attempted to be made mutually dependent on each other by parol evidence, such evidence was peremptorily rejected (*e*).

(*c*) *Dawson v. Ellis*, 1 J. & W. 825; but see 1 *Roper's Husband and Wife*, 2d edit. by Jacob. p. 307, (x).

B. 524; Winch v. Winchester, 1 V. & B. 375.

(*e*) *Croome v. Lediard*, 2 M. & K. 251; see *Van v. Corpe*, 3 M. & K. 369.

(*d*) *Clowes v. Higginson*, 1 V. &

So equity follows the law in rejecting a parol agreement which has been put in writing: such a parol agreement being considered as mere treaty: where a parol agreement is followed by one in writing, the latter supersedes the former, and constitutes the only agreement between the parties (*f*).

If the Court finds a written contract has been entered into, and the Plaintiff says, "That was agreed upon, but then there were certain other terms added, or certain variations made," the Court holds that in such a case the contract is not in the writing, but in the terms which are verbally stated to have been the agreement between the parties; and, therefore, refuses specifically to perform such an agreement (*g*).

At law a parol abandonment of a written contract is not allowed to be given in evidence (*h*). In *Price v. Dyer*, Sir William Grant, M. R., said, he thought a written agreement might be waived by parol, so as to prevent its being specifically performed, if the parol waiver is distinctly and satisfactorily proved, and is an entire abandonment and dissolution of the contract; restoring the parties to their former situation; but a subsequent parol variation is of no effect in equity unless it has been partly performed (*i*).

The origin of this distinction between the effect of a parol waiver of a written contract in law and equity seems to have been the notion that the jurisdiction of equity is discretionary, and that although the plaintiff

(*f*) *Smith v. Hanley*, 1 Ph. 391; cf. *Hiern v. Mill*, 13 Ves. 119.

(*g*) Per Lord Cottenham, *London and Birmingham Railway Company v. Winter*, Cr. & Ph. 57, see

pp. 61—2.

(*h*) Sug. V. & P. 170, and cases there cited.

(*i*) 17 Ves. 356.

was refused relief in equity, he still had the law to resort to; but in cases where the agreement can only be enforced in equity, it is probable that a parol waiver would be a bar to the relief.

The language of Judges has gone farther than the permitting the admission of parol evidence to rebut the equity arising under a written agreement. Lord Hardwicke says expressly, "There is no doubt the Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts: so that, if reduced into writing contrary to the intent of the parties, on proper proof, that would be rectified." Lord Hardwicke saying, the proof ought to be the strongest possible, leaves a weighty caution to future Judges. Lord Thurlow thought the evidence should be of the highest nature, that it should be irrefragable evidence. Lord Eldon, after quoting these dicta, added, "I will not say there are not cases in which evidence may be received to enable the Court to rectify a written agreement, upon surprises and mistakes as well as fraud: proper, irrefragable evidence as clearly satisfactory, that there has been mistake or surprise, as, in the other case, that there has been fraud. I agree, those producing evidence of mistake or surprise, either to rectify an agreement, or calling upon the Court to refuse a specific performance, undertake a case of great difficulty; but it does not follow that it is incompetent therefore to prove the actual existence of it by evidence" (j). Again, in *ex parte* Halket, Lord Eldon

(j) Lord Hardwicke, in *Henkle v. The Royal Exchange Assurance Company*, 1 Ves. 317. Lord Thur-

low, in *Lady Shelburne v. Lord Inchiquin*, 1 Bro. C. C. 338. Lord Eldon, in *The Marquis Townshend*

said, "If you can make out clearly that this was a mistake, as in the case of a joint bond, intended to be joint and several, I might correct the instrument, but that must be established beyond all doubt" (*k*).

The doctrine that a written agreement, or even a deed, may be corrected by parol evidence, if sufficiently strong, can rarely be put higher than the allowing the effect of these instruments to be nullified by the production of parol evidence. But if, in addition to this, it is attempted to insert another term in the agreement or deed, by parol evidence, it seldom occurs that, in a case where there is no fraud, it will be allowed (*l*).

In *Sanderson v. Brown* (*m*), Sir Wm. Grant directed an issue whether it was intended that a certain portion of property should be included in a conveyance; but this only goes to negating the intention of the parties, and to that extent an issue had been directed as to the intention of a testator as to a particular portion of his property, the effect of the finding of which was, that the testator's will did not take effect as to that property; but this is very different from admitting parol evidence to prove an intention different from that on the face of the instrument, and then executing that intention.

Evidence of mistake and surprise can only be relied on when a case is made out, where the Court would consider it as an injury to one party, if the real agreement as proved by the parol evidence was not carried out; and where the injury is of such a nature,

v. Stangroom, 6 Ves. 328, see pp. 338—9.

(*k*) 19 Ves. 474.

(*l*) 1 M. & C. 326; *Herring v.*

Cloberry, 1 Phill. 91; *Carpmael v. Powis*, 1 Phill. 687.

(*m*) *Turn. & Russ.* 46 (*n*).

that although the other party has been guilty of no fraud, yet it would amount to what is called fraud for him to resist performance.

The case of a marriage settlement is one in which the Court does interfere; and that, although an agreement upon marriage is expressly mentioned in the Statute of Frauds, and marriage has been held not to be such a part-performance as to take the case out of the statute.

In the case of *The Duke of Bedford v. The Marquis of Abercorn* (n), where the bill was filed for the specific performance of marriage articles with a variation, Lord Cottenham, C., said, "This is a case in which the jurisdiction of the Court must be exercised. The marriage having taken place, the only question is, what provisions the settlement ought to contain." His Lordship added, "If a settlement had been actually executed, in conformity with these articles, and it could be shewn by proper evidence, that some provision in it had been inserted by mistake and contrary to the intention of the parties, and to the contract previously made between them, it would have been within the province of the Court to have corrected the error and altered the settlement accordingly."

It will be observed, that Lord Cottenham does not exclude parol evidence, at the same time he says, in reference to the case before him, "it is fortunate that written evidence exists of what was the real intention of the parties and of the contract entered into between them."

A discrepancy between the articles and the actual

(n) 1 M. & C. 326.

deed of settlement is, generally, a sufficient ground for altering the settlement conformably to the articles, if it is declared to be made in pursuance of the articles.

On the other hand, it was for a long time held, that if a settlement be made before marriage, and be not declared to be in pursuance of the articles, the articles could not control the settlement, because, it was said, until the marriage, all parties are at liberty; and, therefore, it will be presumed that the alteration arose from a new agreement between them, by which the articles will be controlled (*o*). In *Matthews v. Phillips*, articles were made in 1672 in order to a marriage in 1678, and they imported to be for a settlement without power of revocation, and six years after and before the marriage, a settlement being made with power of revocation, it was held that the articles were either thereby waived, or according to the parties' intent, specifically executed (*p*).

The rule upon this subject, as at present existing, is clearly laid down by Lord Cottenham, C., in *The Marquis of Breadalbane v. The Marquis of Chandos* (*q*). "In order to justify the Court in correcting a settlement, upon the ground of mistake or misapprehension, and introducing into the instrument something which appears to have been the intention of the parties, as evidenced by other means than the settlement itself, it is obvious that a clear intention must be proved; it must be shewn that the settlement does not carry into effect the intention of the parties. If there be merely

(*o*) *Legg v. Goldwire*, Ca. t. Talbot, 20.

(*p*) *Colles*, Parl. Ca. 347.
(*q*) 2 M. & C. 710, see pp. 739—40.

evidence of doubtful or ambiguous words having been used, the settlement itself is the construction which the parties have put upon those doubtful or ambiguous words. They have themselves removed any doubt which might have existed upon that which forms the foundation of the settlement." Again, "in order to justify the Court in correcting the settlement, it must be proved, not only that the contract was different from that which the settlement carried into effect, but that there was no change of intention by which the circumstance that the settlement did not follow the terms of the original contract might be explained."

Accordingly, in *Pearce v. Verbeke* (*r*), there being a discrepancy between the articles and the settlement, Lord Langdale, M. R., received and acted upon the evidence of the solicitor, who stated that he prepared the settlement from the articles, and intended to carry them out by it.

In these cases of articles and a settlement following, there is, in fact, written evidence upon which to act; the case is far more difficult when a settlement, actually executed, is proposed to be altered upon parol evidence only.

Lord Thurlow thought it was impossible to refuse, as incompetent, parol evidence which goes to prove, that the words taken down in writing were contrary to the concurrent intention of all parties; and this doctrine has been repeatedly admitted by Lord Eldon and later Judges (*s*).

In *Doran v. Ross*, there being a question as to the

(*r*) 2 Beav. 333.

(*s*) *Shelburne v. Inchiquin*, 1 B.

C. C. 341. See *Eden v. Lord Bute*,
7 B. P. C. 445, and sup. p. 102.

intention of parties in a marriage settlement, it was urged that the wife had put a construction upon it by her will. Lord Thurlow, C., said, that would be of no use, for it would only shew what she understood it to be; but I cannot take her interpretation (*t*).

This case seems at first sight in opposition to that of *Barstow v. Kilvington* (*u*), there a settlement, giving an estate to the wife, was re-formed in favour of her children, upon the evidence of intention afforded by the wife's letter, after the death of her husband, and twenty years after the marriage; but the latter decision may be supported on the ground that the settlement actually executed was so imperfect that it was clear upon the face of it that it could not represent the real agreement of the parties.

Lord Rosslyn had some difficulty in altering the settlement, but he seems very strangely to have considered that it was a stronger case than that of *Jenkins v. Quinchant* (*v*), where the settlement was altered in accordance with a letter of instruction written prior to the settlement; not distinguishing between the written evidence of intention in the one case, and the parol evidence in another. In decreeing the alteration he relied much on the nature of the settlement; it was certainly such as never could have been the deliberate intention of the parties making it; there were evident marks of great inaccuracy, and great want of skill, in the person who drew it: and he said, referring to *Jenkins v. Quinchant*, " The cases are so very parallel: there

(*t*) 1 Ves. jun. 57; S. C. 3 B. C. C. 27. It is reported in *Brown* as a refusal to admit parol evidence.

(*u*) 5 Ves. 593.

(*v*) 5 Ves. 596 (*p*).

is only this difference: that was a letter of instruction prior to the settlement; which might be equivocal, as there might be an immediate alteration of intention; but this is a declaration made not loosely, but upon the marriage of one of the children, what the wife's intentions were in an existing settlement." This reasoning is obviously in opposition to Lord Thurlow's doctrine in *Doran v. Ross* (*w*).

(*w*) *Ubi sup.*

CHAPTER VII.

The Party seeking Performance of a Contract must fulfil his Obligation under it.

HE that exhibits a bill for a specific performance of an agreement must, in order to entitle himself to the aid of the Court, shew that he has performed all that was contracted to be done on his part, or that he is ready so to do; because it is a rule of equity, in contracts and agreements, that they must be decreed to be performed on both sides, and entirely, or not at all. And therefore, if it has by subsequent events become impossible for a plaintiff to perform his part of the agreement at the time of exhibiting his bill, he cannot be entitled to a specific performance of that contract, which he is himself incapable to execute specifically (a).

In this respect the practice of Courts of Equity agrees with that of Courts of Law, being founded on the same general principle: for the latter requires that, where an action of assumpsit is brought upon an agreement, or an action upon a covenant in an agreement, wherein the second thing to be done, and for not doing of which the action is brought, is in

(a) Powell on Contracts, 19.

consideration of something to be done first; the person bringing the action should shew, if the thing to be done by him be such as he can perform without the interference of the other contracting party, that he has done the first thing; or if it be of such a nature that it cannot be done without the concurrence of the other contracting party, that he is ready and has a right, at the time of bringing the action, to do it (b).

Those who are claiming the performance of a contract of any kind are never in a situation to do so, unless they are themselves prepared to fulfil what they have undertaken on their own part (c). This is the principle on which, in equity, a lien is given to a purchaser for his unpaid purchase money. Equity will not put the purchaser into complete possession of his purchase without taking care that the price was paid. This is the doctrine of the cases which are fully collected in Sir Edward Sugden's book (d).

In *Corsbie v. Free* (e) it was held that the assignees of a bankrupt husband could not claim a reversionary interest belonging to the wife and settled on the marriage, which had since fallen in, without performing the covenant of the husband, contained in the settlement, to pay certain sums to the trustees upon the trusts of the settlement. "Where the covenant," said Lord Cottenham, C., "is become due, and the money has not been received, to allow the husband, or those who claim through him, to receive a fund which was the consideration for his covenant, while, on the other

(b) Powell, 22.

(c) Per Lord Cottenham, C., Cr.
& Ph. 74.

(d) V. & P. 857.

(e) Cr. & Ph. 64.

hand, he is not in a situation to perform that covenant, would be neither more nor less than putting the purchaser into the possession of his purchase, without taking care that the price was paid."

His Lordship added, "In a case, which was referred to, of *Basevi v. Serra* (*f*), Sir William Grant alludes to the particular state of circumstances which occurs here. In that case the husband was alive, and his covenant was to take effect only upon his death. It is true, there was every probability, in his circumstances at that time, that he would not be able to perform his covenant; but the property of which he was the purchaser was then the subject-matter of adjudication; and the question was, whether those who claimed through him were to receive the property, there being a covenant in the settlement which was unperformed, and properly so, because the time was not come when it was to be performed. Sir William Grant there says, in effect, 'I cannot arrest this money in order to secure the performance of the covenant, because the parties have thought proper to trust to the covenant, and not to make the husband's title to the money depend upon the performance of that covenant.' So, if a party selling an estate chooses to stipulate that the contract shall be completed, and the land conveyed, trusting for the payment of the purchase money to the personal obligation of the purchaser, he cannot afterwards say, you shall not have the estate before you pay; because, under the contract, the right to a conveyance is not dependent on the pay-

ment of the purchase money. But, says Sir William Grant, 'if the time had come when the covenant was to be performed, and the consideration money was to be paid, the Court would not permit the party to receive that which he had purchased without taking care that he paid the stipulated price for it.' The latter part of Sir William Grant's judgment comes precisely within the present case, because here the time has arrived when the consideration money is to be paid for that which the husband, or those who represent him, now claim" (*g*).

The principle has been carried a good deal farther. In the case of *Mitford v. Mitford* (*h*), Sir William Grant considers this species of right as a sort of lien upon the fund which the party is claiming; and, where a husband was unable to perform his covenant, and yet claimed the portion of the wife's property, which under the articles he was entitled to, it was considered that the parties, who were entitled to claim the benefit of the covenant, had a right to insist on his portion of the fund being applied in satisfaction of his covenant.

Nor have the Courts stopped here. In *Priddy v. Rose* (*i*), a sum of £4000 was covenanted to be paid, and another sum of £4000 actually paid by the husband, and two other sums paid by the wife's father, to the trustees upon the trusts of the settlement, the first trust being to the husband for life. Not having paid the £4000 covenanted to be paid, he charged his life interest for the benefit of annuitants, and then

(*g*) *Corshie v. Free*, Cr. & Ph.
64; see p. 75.

(*h*) 9 Ves. 96.
(*i*) 3 Mer. 86.

absconded, after which time the trustees received the whole of the dividends and invested the same in stock, in satisfaction of the unperformed covenant. Sir W. Grant held they were entitled so to do. "I apprehend it," said he, "to be clear that he could not have claimed a benefit under the settlement, without making good his part of it. The trustees might give him what credit they chose, subject to their responsibility to their cestui que trusts; but they might at any time after the £4000 became due, have stopped the dividends, if the money was not paid. Supposing he had become a bankrupt, the trustees would have this equity as against the assignees, as was determined by Lord Thurlow in *ex parte* Mitford (j). After stating that case his Honor added, "Now, if, as against Hunt [the husband], the trustees had the equity of stopping the dividends to make good the debt of £4000, could he by this act, without their knowledge or consent, deprive them of that equity? The assignee for the annuitants, taking no legal interest in the funds, could only take, subject to the same equity to which the assignor was liable."

"It is the settled practice in bankruptcy," said Sir L. Shadwell, V. C. E., "where the tenant for life of a trust fund has improperly obtained possession of it, and withdrawn it from the settlement, and afterwards becomes bankrupt, to direct, when proof is made in respect of the fund under the commission, that the trustees shall receive the interest of the dividends made on the sum proved, and apply it to make good the full amount of the fund." After referring to the

(j) 1 B. C. C. 398. The order is stated 3 Mer. 105.

case of *ex parte* King (*k*) his Honor added, "The case of *ex parte* Mitford (*l*) went further, for there Lord Thurlow directed that the trustees of the settlement, to whom the bankrupt had not paid a sum of money which, by the settlement, he had covenanted to pay, should be at liberty to retain an annuity and the dividends of a sum of stock which were two of the subjects of the settlement, and to which the bankrupt was entitled for life, besides giving other directions which were tantamount to that direction to which I have alluded in *ex parte* King. In *ex parte* Mitford, therefore, the jurisdiction in bankruptcy extended the right of the trustees to other funds than those which were the subject of abstraction; and Lord Thurlow clearly thought that those other funds to which the bankrupt was entitled, having been made subject to the trust of the settlement, did, as far as the bankrupt had an interest in them, become liable to make good the fraud, which, in one sense, the bankrupt had committed, by not paying the sum of money which he had covenanted to pay to the trustees" (*m*).

His Honor, in his judgment in *Woodyatt v. Gresley*, from which I have extracted this passage, laid down the principle largely saying, that a Court of Equity could not hold that it is competent for a person to derive a benefit under a deed, and, at the same time, to shrink from the performance of a duty imposed by that deed (*n*). And, upon this principle, he rested his

(*k*) 2 Mont. & Ayr. 410.

(*l*) 1 B. C. C. 398.

(*m*) 8 Sim. 186. *Booth v. Booth*,

1 Beav. 125.

(*n*) *Woodyatt v. Gresley*, 8 Sim. 180. See p. 187.

decision in that case. Lady Gresley assigned South Sea Annuities, in which she had a reversionary interest at the time of her marriage, to the trustees upon trusts in favour of herself and children; under a contemporaneous deed of settlement she took a legal rent-charge in her husband's estate; she afterwards, when the annuities fell into possession, received and spent the produce of them. A married child, on discovering the fraud, filed a bill for a receiver of this legal rent-charge to make up the deficient fund, and his Honor said, "The only difference between this case and *ex parte* Mitford, is that there the persons who were applying to make the proof in bankruptcy, had the legal dominion over the other fund, which was the subject of the settlement. But here the trustees have no dominion over the rent-charge." His Honor, however, held, upon the principle stated, that with respect to the rent-charges, there was an equity on the part of those who claim under the settlement, to say, that Lady Gresley and her son, who claims under her, with notice of the fraud that she had committed, were liable to make good the loss occasioned by that fraud out of the rent-charge.

If a party enters into a covenant in a deed for the payment of money, and takes a legal estate under that deed; unless he has paid the money, it seems, upon these cases, that the estate he takes, in his own hands or in the hands of those who claim under him voluntarily or with notice of the covenant, will be liable to make good the deficiency arising from the non-performance of his covenant.

It appears from these cases that no distinction is made in equity between the non-performance of a covenant to pay money and a fraudulent abstraction of money that has been paid. It is, therefore, the duty of every purchaser of an interest which a party takes under a deed, wherein he covenants for the payment of money, to ascertain whether that covenant has been performed.

It seems, from the case of *Fuller v. Knight* (*o*), that the power of the trustees to apply an interest which a party takes under a deed, to the satisfaction of a duty imposed on him by it, is a power for the benefit of their *cestui que trusts*, and which it is not competent for the trustees, by direct covenant, to contract not to exercise.

A vendor cannot be aided in equity who is unable to secure to the purchaser the specific property for which he contracted (*p*). A Court of Equity cannot enforce performance on one side, without examining whether there be a capacity to perform on the other (*q*).

In the case of an agreement for a purchase, or for a lease, or for an exchange of lands, it is a condition implied by the law, that the party selling, or leasing, or exchanging, shall shew a good title to the lands (*r*).

A Court of Equity will not force anything but a good title on a purchaser; a purchaser, it is said, will not be compelled to buy a law suit (*s*).

Judges in Courts of Law have also said, that a

(*o*) 6 Beav. 205.

(*p*) Per Sir J. Leach, V. C.,
Fildes v. Hooker, 3 Madd. 193.

(*q*) Per Sir W. Grant, M. R.,
Fildes v. Hooker, 3 Mer. 424.

(*r*) *Ogilvie v. Foljambe*, 3 Mer.

53; *Pearson v. Lane*, 17 Ves. 101.

(*s*) Per Sir J. Leach, Price v.
Strange, 6 Madd. 165; *Marlow v.*
Smith, 2 P. W. 197; *Colton v.*
Wilson, 3 P. W. 190, 1 B. C. C. 76;
Cooper v. Denne, 1 Ves. jun. 565.

purchaser is not bound to take a doubtful title (*t*). But a Court of Law only refuses to force a doubtful title upon the purchaser, when that doubt arises out of a question of fact; a Court of Equity refuses to compel him to take a title, which depends upon the decision of a question of law which the individual Judge thinks matter of grave and reasonable doubt (*u*). On the other hand, Courts of Law consider themselves as bound to determine, if it is a mere question of law, such as the construction of a deed, whether the party has the title he agreed to give (*v*). It being a rule that the title should be one good at law and in equity, both Courts consider that an equitable objection to the title is a sufficient objection. It follows that Courts of Law must determine whether an equitable objection to the titles is valid or not.

Accordingly Mr. Baron Parke, in *Doe d. Cadwalader v. Price* (*w*), said, "This is not the only case in which Courts of Law are called on to determine questions appertaining to Courts of Equity. Where a man sells an estate we are called on to say, whether the title he offers is a good one, both at law and in equity, and the point before us in such cases is, can such good title be made?"

The result of the cases is, that Courts of Equity will not decide whether a title be good or not, but only go the length of determining it to be doubtful; whilst Courts of Law, not only undertake to determine ques-

(*t*) *Wilde v. Fort*, 4 Taunt. 334.

(*u*) *Earl of Lincoln v. Arcedeckne*,
1 Y. & C., C. C. 101; *Jervoise v.*
Duke of Northumberland, 1 J. &
W. 559.

(*v*) *Boyman v. Gutch*, 7 Bing.
390.

(*w*) 11 Jur. 132. *Maberley v.*
Robins, 5 Taunt. 625.

tions of law, but also questions of equity, in relation to the validity of titles.

This anomaly in the practice of Courts of Equity, which refuse to decide whether the title is good or bad, and only decide that there is doubt about it, and which refuse to force the purchaser to take the title, if there is a cloud upon it, incidentally arose from their considering that there was a remedy at law, and that the jurisdiction was therefore discretionary; but the doctrine seems now too well established to allow us to confine its application to those cases where relief can be obtained at law. It is said that the Court, knowing its decision on the title could not bind everybody, would not force the purchaser to take a title, which it could not warrant to him (*x*); but this obviously supposed an uncertainty as to the law, which ought, in a perfect system of jurisprudence, never to be presumed.

A party applying to the Court to compel specific performance of an agreement to buy an estate against the purchaser, or to let an estate against the lessee, must be ready to enter into the proper covenants which the law implies, as part of a good title in these respective cases (*y*).

The general principle of law, that where a person makes a grant of any given thing, he impliedly grants that also which is necessary to make the grant of the principal subject effectual, does not admit of dis-

(*x*) *Lowes v. Lush*, 14 Ves. 550. The question as to the title that may be required by a purchaser is one not belonging to this treatise, but is fully discussed in Sir Edward Sugden's Work.

(*y*) *Church v. Brown*, 15 Ves. 250; *Cooper v. Emery*, 10 Sim. 609. The doctrine as to covenants in the case of sales of property in fee-simple is fully set out in Sir E. Sugden's Work.

pute (*y*). And this principle is carried to the extent, that the implied grant entitles the lessee to whatever is necessary to the full enjoyment of the subject of the grant (*z*).

In *Henderson v. Hay* (*a*), Sir James Wigram, V. C., said, "The question was, whether, under an agreement to grant a lease upon common and usual covenants, the lessor was entitled to a covenant from the lessee, not to assign without license. Lord Thurlow decided that the lessor was not so entitled, upon the ground that proper and usual covenants could only be understood to mean covenants "incidental to the lease." By the term, "incidental to the lease," I understand Lord Thurlow to mean such covenants as were necessary to protect a leasehold interest, without affecting its legal incidents, and no other covenants. Considerable doubt appears to have been thrown upon this decision by the case of *Morgan v. Slaughter*, and the case of *Folkingham v. Croft* (*b*). But in the subsequent case of *Church v. Brown* (*c*), Lord Eldon, after great consideration, upheld Lord Thurlow's decision in *Henderson v. Hay*, and decided that it made no difference whether the agreement declared that the lease contracted for was to contain the usual and proper covenants or not,—that in every agreement, whether as to freehold or leasehold estate, it was implied that there were usual and proper covenants

(*y*) See Co. Litt. 56 a., 163 a.; 3 Com. Dig. 85, ed. 5; 3 Burge Com. 416; *Pomfret v. Ricroft*, 1 Saund. 320, and notes.
(*z*) 1 T. R. 560.

(*a*) 3 B. C. C. 632.
(*b*) 1 Esp. N. P. Cases, 8. 3
Anst. 700.
(*c*) 15 Ves. 258.

that both lessor and lessee would be entitled to such covenants as were strictly incidental to the subject of the agreement and to no others * * *. Covenants become usual and proper covenants only because by common consent, they are found essential to perfect the contract between the parties" (*d*).

The common and usual covenants between landlord and tenant will not therefore extend to covenants in restraint of trade (*e*), and a covenant for renewal under the like covenants does not extend to that very covenant for renewal (*f*).

In consequence of there being covenants required in a lease from the lessee, that lessee, upon an assignment by him of the lease to a third party, is entitled to covenants of indemnity for his protection against the liabilities he has entered into from the assignee.

Lord Eldon, in *Staines v. Morris* (*g*), said, "The equity is clear, that he who takes an assignment of a term, shall take it, giving a covenant of indemnity to the assignor against the payment of the rent and the performance of the covenants; and there is no distinction between the cases of assignment by the original lessee: the propriety of enforcing that covenant being as manifest in the case of the assignee, that he may be indemnified in respect of his parting with the possession, out of which the duty to pay the rent accrues, independent of actual covenant, as in the case of assignment by the original lessee."

It is clear that proper assignments of the lease

(*d*) *Blakesley v. Whieldon*, 1 Hare, 176, see p. 181.

(*e*) *Van v. Corpe*, 3 M. & K. 269; *Proper v. Parker*, 3 M. & K.

280.

(*f*) *Moore v. Foley*, 6 Ves. 232.

(*g*) 1 V. & B. 8. See *Cochrane v. Robinson*, 11 Sim. 378.

would be made with express covenants on the part of the assignees, so as to keep up the chain of indemnities for the benefit of the lessee; when this is done, the doctrine of an assignment putting an end to the liability of an assignee is to be limited to this, that the liability ceases only as respects the obligation to the landlord, and it remains under the personal covenants.

And it follows from Lord Eldon's doctrine, that although no such covenant was entered into, yet there was a claim in equity to have such a covenant (*h*); if, therefore, the assignments of the lease from the first lessee are only equitable, the assignment simply will not discharge the assignor in equity from the obligation to indemnify those from whom he takes the lease.

But if the contract between the lessee and the first assignee, or that assignee and a purchaser is actually carried into effect by an assignment, without such covenants for indemnity it would be against all principle to insist on their being given; the intention of the parties, which, whilst the matter remained in agreement, is implied by the Court, becomes fixed and declared by the actual execution of the deed, and the deeds actually executed form a complete answer to the claim for such an execution of the agreement to assign.

This is agreeable to the decision in *Rowley v. Adams* (*i*); there the assignment of the lease was made to the testator subject to the payment of rent and the performance of covenants, but without any

(*h*) *Close v. Wilberforce*, 1 B. 112; *Jenkins v. Portman*, 1 Keen, 455; *Sanders v. Benson*, 4 B. 350.

See also *Harly v. King*, 2 Cr., M. & R. 18.

(*i*) 4 M. & C. 534.

express covenants on his part. The Master of the Rolls directed an inquiry, whether the executors might not have, by due diligence, relieved the testator's estate from all liability. Lord Cottenham said, that the testator had not so become liable to the covenants, that his estate could not be relieved, referring to the case of *Wolveridge v. Steward* (*j*). If the testator's estate was liable in equity, it is impossible that such a fact should not have been noticed by the very learned Judges who decided this case (*k*).

If the chain of covenants is once broken, whether by the purchase being from the assignees of a bankrupt, or by the covenant for indemnity having been omitted on the actual legal assignment of the lease, the claim to such a covenant from future assignees is of necessity gone.

An equitable title cannot be given to the purchaser, unless he obtains a complete discharge for his purchase money. Courts of Equity have held, that all persons having trust estates, whether land or money, in their hands with notice of the trusts, become themselves trustees of the trust estates; unless, therefore, the author of the trust, the person who had the absolute power of disposal of the property, points out a specific mode of discharge, the purchaser must see to the application of the purchase money; in general, trustees have, by the settlement or will, power to give discharges, expressly given to them, or it must be necessarily implied (*l*). Some Judges have indeed thought that the very power to sell ought to have

(*j*) 1 Cr. & M. 644.

172, (*n*).

(*k*) Bythewood & Jarman's Conveyancing by Sweet, 9th vol. p.

(*l*) *Breedon v. Breedon*, 1 R. & M. 413.

been considered as implying a power to give discharges (*m*); and even Sir William Grant thought the doctrine carried too far: he said, "Where the act is a breach of duty in the trustee, it is very fit, that those who deal with him should be affected by an act tending to defeat the trust of which they have notice; but, where the sale is made by the trustee in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his powers, that is, to give a valid discharge for the purchase money" (*n*). This power is implied when the sale is for the payment of debts according to the doctrine of the last decided cases (*o*).

In a Court of Law a plaintiff, seeking to recover damages for a breach of contract, must prove that he is ready to comply with his part of the contract to the letter, and unless he has done this, the defendant cannot be made to pay damages: in an agreement for sale, if the contract is not strictly fulfilled on the part of the vendor, the purchaser may consider the contract at an end, and recover his deposit.

But the doctrine of a Court of Equity is not forfeiture, but compensation (*p*), if the party really gets what he contracted for, or what is a compensation, he ought, in the consideration of a Court of Equity, to keep to his contract (*p*). The principle is, that if he gets substantially that for which he bargains, he must take a compensation for a deficiency in the value (*q*).

(*m*) See 4 Ves. 99.

(*n*) *Balfour v. Welland*, 16 Ves. 156.

(*o*) *Page v. Adam*, 4 Beav. 469; *Forbes v. Peacock*, 1 Phillips, 717.

(*p*) Per Sir J. Leach, *M. R.*, *Page v. Broom*, 4 Russ. 6.

(*q*) Sir W. Grant in *Dyer v. Hargrave*, 10 Ves. 806.

So much has equity been in the habit of looking to the substantial intent of the agreement, and not merely the mere literal terms of it, that, at times the language of Judges seems to attribute the whole jurisdiction of equity in specific performance to this circumstance.

Lord Thurlow used to refer this doctrine of specific performance to this; that it is scarcely possible that there may not be some small mistake or inaccuracy, as that a leasehold interest, represented to be for twenty-one years, may be for twenty years and nine months; some of those little circumstances that would defeat an action at law, and yet be so clearly in compensation, that they ought not to prevent the execution of the contract (*r*), and at other times he used to say, that the jurisdiction of a Court of Equity to compel a specific performance, must have been founded upon the notion of its being against conscience to take advantage of small circumstances of variation in the description of the thing contracted for; and that the principle being once established was gradually enlarged, till a specific performance in equity became at length a performance of anything rather than the real contract between the parties. Such are the cases of the house and wharf, before Sir Thomas Sewell: of the estate purchased as an estate in Essex, which turned out to be in Kent; and the case of Lord Stanhope, whose object was to get an estate tithe free, and who was made to take an estate subject to tithe with a compensation (*s*).

But this language must be received with a due

(*r*) Per Lord Eldon, *Mortlock v. Butler*, 10 Ves. 305, 306.

(*s*) Per Lord Eldon, 1 Mer. 32.

regard to the circumstances of the cases in which it was used: expressions as to the origin of equitable jurisdiction, are to be understood as referring to the occasion of its exercise. We have seen that it is not because damages at law are an adequate remedy for a breach of contract, that equity specifically performs contracts, although the language of Judges seems to imply this; nor is it because the technical rules of law prevent those damages being obtained. The jurisdiction exists because the conscience of the party is bound by the agreement to perform it in specie; and equity will always entertain the suit, unless it be proved that specific performance is not necessary, or cannot be enforced.

"The Courts," said Lord Redesdale, "in all cases of contracts for estates in land, have been in the habit of relieving where the party, from his own neglect, had suffered a lapse of time, and from that or other circumstances, could not maintain an action to recover damages at law, and even where nothing exists to prevent his suing at law, so many things are necessary to enable him to recover at law, that the formalities alone render it very inconvenient and hazardous so to proceed, nor could, in many cases, the legal remedy be adequate to the demands of justice. Courts of Equity have therefore enforced contracts specifically where no action for damages could be maintained: for, at law, the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases was sufficient to require the interference of Courts of Equity: they dispense with that which would make compliance with what the law

requires oppressive, and in various cases of such contracts; they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus, in the case of an estate sold by auction, there is a condition to forfeit the deposit, if the purchase be not completed within a certain time, yet the Court is in the constant habit of relieving against the lapse of time, and so in the case of mortgages, and in many instances relief is given against mere lapse of time, where lapse of time is not essential to the substance of the contract" (*t*).

The Court does not insist on the party filing the bill, shewing he had out of Court fully performed the agreement. The general rule is not so strict, a party filing a bill submits to do every thing that is required of him; and the practice of the Court is not to require the party to make a formal tender where from the facts stated in the bill, or from the evidence, it appears that the tender would have been a mere form (*u*).

If the seller have no more than an equitable title, the contract is not binding upon the purchaser at law (*v*), but it is in equity, if the seller can get a conveyance of the legal estate; and a party having the equitable title only can sustain a bill for specific performance (*w*).

With respect to the time of fulfilling a contract, time is not so material in equity as at law (*x*). Upon this principle Courts of Equity first gave relief in the

(*t*) *Lennon v. Napper*, 2 Sch. & Lef. 682, see p. 684.

(*u*) *Hunter v. Daniell*, 4 Hare, 433; *Gibson v. Patterson*, 1 Atk. 12.

(*v*) *Cane v. Baldwin*, 1 Stark. 65.

(*w*) *Crop v. Norton*, 2 Atk. 74.

(*x*) *Seton v. Slade*, 7 Ves. 265.

case of bonds to pay a sum of money, which were relieved against there, notwithstanding the condition broken at law, upon payment of principal, interest and costs; this was afterwards adopted by the Legislature; so before the statute enabling tenants to avoid a forfeiture for non-payment of rent, equity relieved on payment of the rent due and interest and costs; so in an early case, where the purchaser had agreed that if the money were not paid on a certain day he should lose his deposit and the benefit of the agreement, after making default he brought his bill to have the purchase completed on payment of principal, interest, and costs. Lord Macclesfield said, "That lapse of time in payment might be recompensed with interest and costs" (*y*).

As to the materiality of time in contracts of sale. It seems the doctrine of the Court that in almost every case, except the purchase of lands in fee-simple (but in that case only by express agreement) (*z*), time will be considered as of the essence of a contract. The cases establish that it will be considered essential in the purchase of a house for residence (*a*), or of lands or houses for the purposes of trade (*b*), in dealing for reversionary interests (*c*), or concurrent leases (*d*), where the contract is for the grant of an annuity for the life of an individual (*e*), and in covenants

(*y*) *Vernon v. Stephens*, 2 P. W. 66.

(*z*) See the cases, Sug. V. & P. 292. *Reynolds v. Nelson*, 6 Mad. 18.

(*a*) Per Lord Eldon, *Levy v. Lindo*, 3 Mer. 81.

(*b*) *Coslake v. Till*, 1 Russ. 176;

Walker v. Jeffreys, 1 Hare, 431.

(*c*) *Newman v. Rogers*, 4 B. C. C. 391.

(*d*) *Carter v. Dean of Ely*, 7 Sim. 211; but see *Dyer v. Hargrave*, 10 Ves. 507.

(*e*) *Withy v. Cottle*, T. & R. 81.

to renew leases for lives or years (*f*), where the contract relates to stock in the public funds (*g*), or where there is a reference to arbitrators as to the price (*h*), or where the vendors are an ecclesiastical corporation or other fluctuating body (*i*).

This doctrine, is independent of the rule that laches bars the right, and although the delay should be unavoidable, as in the case of infancy, yet, if prejudicial to the other party, it bars the right to enforce the contract.

Again, the Courts of Equity not only apply their own rules to the decision of the question, what is in fact and substantially that which has been agreed to be done by the party applying to them; and if they can secure that which is substantially contracted for, neglect the compliance with less important particulars; but they also consider that the actual contract between the parties may be proved in a variety of ways, shewing those rights, which, upon the face of the agreement, or, according to the ordinary rules of law, belong to each party, to be varied and modified.

It is, as we have seen, a rule of the law, that a party selling to another an estate, or agreeing to give him a lease of it, should shew a good title, and there are other rights incidental to the position of purchaser of a freehold or leasehold interest, or of lessee.

But in equity these rights are modified and varied in many ways: of course they are completely subject to any express agreement upon the subject.

(*f*) *Bayley v. the Corporation of Leominster*, 3 Bro. C. C. 529; *Eaton v. Lyon*, 3 Ves. 690; *The City of London v. Mitford*, 14 Ves. 41; *Moore v. Foley*, 6 Ves. 237; *Harris v. Bryant*, 4 Russ. 89.

(*g*) *Forrest v. Elwes*, 4 Ves. 492.

(*h*) *Morse v. Merest*, 6 Mad. 27.

(*i*) *Carter v. Dean of Ely*, *ubi sup.*

But agreements are in equity frequently implied as to title, from the fact that the purchaser had, at the time of entering into the contract, notice of the state of the title.

In the case of the person who agrees to give to another either his own interest in the property, or any interest out of that, not having an absolute interest in fee-simple, notice of this fact to the party with whom he is contracting will be generally held to bind that party not to require of the vendor or lessor what, in the absence of such notice, he would be entitled to.

In *Hall v. Smith*, Sir W. Grant said, "Where a lease is stated, it is the business of a party to look at it, and to see whether there is any covenant that may materially influence his judgment as to the value" (*j*).

A man who agrees to take an underlease must know he is to be bound by all the covenants contained in the original lease; notice that the party from whom he takes holds under a lease, is notice of all the covenants in that lease (*k*). If the party has notice that the estate is in lease, he has notice of every thing contained in the lease (*l*).

In *Byrne v. Acton* (*m*), a party having with notice of a settlement giving power to a tenant for life to grant a lease for three lives, or twenty-one years, obtained

(*j*) 14 Ves. 333. See *Pope v. Garland*, 4 Y. & C. 294.

(*k*) *Proper v. Parker*, 3 M. & K. 280; *Cosser v. Collinge*, 3 M. & K. 283.

(*l*) *Walter v. Maunde*, 1 J. & W. 181.

(*m*) 1 B. C. C. 186. Sir John Leach is reported to have said, in June, 1832, that, whether a man entering into an agreement for an

underlease, had constructive notice of unusual covenants, he believed had never been decided; having in February, 1832, himself said, that *prima facie*, a man who agrees to take an underlease, must know that he is to be bound by all the covenants contained in the original lease; and the latter is the true doctrine. Compare 3 M. & K. 282—3, and 3 M. & K. 287.

an agreement from him for a lease for thirty years, was only allowed by the House of Lords to have a lease according to the power; it appearing by the articles of agreement, that although the settlement itself was known to exist, its contents were not known to either party.

Agreements may be made for taking such title as the vendor has, but such agreements will not be implied (*n*). An agreement that the vendor shall not be required to shew his title, would not compel the purchaser to take a bad title (*o*), and conditions, that the vendor shall not be required to deduce any title prior to a certain time, cannot be considered as compelling the purchaser to waive defects in the title, prior to that date, which he knows *aliunde* (*p*). So where the purchaser has waived his right of inquiry as to title, if the title is shewn to be bad, it cannot be forced on him (*q*). Such waiver is often implied (*r*). Possession generally amounts to a waiver even of objections to title (*s*). The purchaser is bound to take an objection as soon as it is known to him (*t*).

But it was urged, without effect, in *Stapylton v. Scott*, before Lord Eldon, that the plaintiff, before filing his bill, having had the abstract with the special description of the title, the circumstance of his filing

(*n*) *Freme v. Wright*, 4 Madd. 364; *Southby v. Hutt*, 2 M. & C. 207.

(*o*) *Warren v. Richardson*, Younge, 1.

(*p*) 8. C.

(*q*) *Blatchford v. Kirkpatrick*, 6 B. 232.

(*r*) *Ogilvie v. Foljambe*, 3 Mer. 60.

(*s*) *Fludyer v. Cocker*, 12 Ves. 27; *Haydon v. Bell*, 1 Beav. 337.

(*t*) *Salisbury v. Hatcher*, 2 Y. & C., C. C. 54; *Thomas v. Blackman*, 1 Coll. 301.

such a bill with that knowledge was to bind him (u): of course a purchaser has rarely notice of any defect in the title before the delivery of the abstract.

Still the rule of the Court is, that whether by express agreement or by implication, the right to have a good title shewn is waived, yet if the title is shewn to be bad, it will not be forced upon the purchaser. A waiver of the defendant's right to make the plaintiff produce his title, does not seem necessarily to import that he will accept the title, though it should manifestly appear to be bad (v). If there is a valid contract and the title is accepted, yet if the parties delay asking for the specific performance of a contract, and for a conveyance of the legal estate, as they might do; and in the interval before the contract is completed, and while the purchase-money is in the hands of one party and the legal estate in the other, it should turn out, that that title which had been supposed to be good, was really a bad title; Lord Langdale, M. R., stated, he was not prepared to say, that the Court knowing the title to be bad, would order the party to accept it, and pay the purchase-money for it. "This, I think," said his Lordship, "I must state that if it did appear to the Court that there [here] the vendor had no title at the time this contract was entered into, and this matter being left by the acquiescence of both parties, as it certainly must have been in the same state, the money being in the hands of the purchasers, and the legal estate, such as it was in the hands of the sellers,

(u) 16 Ves. 272.

(v) Per L. C. B., Younge, 1.

the Court would not, knowing there was a bad title, order a conveyance to be made and accepted" (*w*).

An agreement to accept the title, without dispute, precludes the purchaser from taking any objection to the title (*x*).

(*w*) 6 B. 232.

(*x*) Duke v. Barnett, 2 Coll. 337.

CHAPTER VIII.

The Contract must be such as the Court can enforce.

IF the agreement cannot be enforced by the Court, the bill must be dismissed. "In bills for specific performance," says Lord Hardwicke, "the Court never gives relief where the act is impossible to be done, but leaves the party to the remedy at law" (a).

Unless the Court can secure the actual performance of the agreement, it can give no relief; an agreement, therefore, which is the subject of an application to a Court of Equity, must be such, as it has jurisdiction to direct to be specifically carried into execution, for it matters nothing, whether the act be impossible to be done or whether the Court, by its known processes, has no means of enforcing its execution.

There are certain agreements of which the Court has no power to compel the performance, and these are, speaking generally, all personal agreements of an indefinite description, there being no means of ensuring the performance. But agreements not to do a thing, are so definite and so easily enforced by the injunction of the Court, that the jurisdiction to enforce

(a) *Green v. Smith*, 1 Atk. 571. *Nicolson v. Wordsworth*, 2 Sw. 365.
See *Peart v. Bushell*, 2 Sim. 38;

them is frequently exercised, and is of a most beneficial character. Equity in such cases gives a more certain, speedy, and efficacious relief than can be afforded by a Court of Law; and the loss which a breach of the agreement may occasion, until which there can be no action at law, may be utterly impossible to be meted out in damages.

We shall consider somewhat in detail the cases in which the Court exercises jurisdiction to enforce personal agreements: first, those agreements which are of a negative character, and enforced by a negative injunction; second, those which although of a positive character, are enforced by the negative form of injunction; and thirdly, those which being positive in character, are enforced by a positive order.

Almost the earliest case of the Court interfering by perpetual injunction to enforce the performance of negative agreements, is *Martin v. Nutkin* (*b*), where the plaintiffs' house, being so near the church, that the five o'clock bell rung in the morning disturbed one of them, they came to an agreement in writing with the churchwardens and inhabitants in vestry, that the plaintiffs would erect a cupola, clock, and new bell at the church, and in consideration thereof, the five o'clock bell should not be rung in the morning. The cupola was built and the bell silenced for two years, but a new order of vestry having been obtained to ring the bell, the plaintiffs filed their bill to restrain the ringing. Lord Macclesfield, C., granted the injunction till the hearing, and at the hearing, the Lords

(*b*) 2 P. W. 266.

Commissioners decreed that the injunction should continue during the lives of the plaintiffs and the survivor of them.

In *Morris v. Lord Berkeley*, Lord Hardwicke, on an application to continue an injunction against building, said, "Whosoever comes into this Court on such a right must found it either on defendant's building so as to stop ancient lights, or else on some agreement either proved or reasonable presumption thereof" (c).

And the principle has been continually admitted of enforcing the performance of such covenants; in *Barret v. Blagrove*, the defendants had covenanted with the proprietors of Vauxhall Gardens, that they would not carry on the business of a victualler, under the penalty of forfeiture of the lease, the Lord Chancellor restrained their carrying on the business, stating that it was in the nature of specific performance (d). The counsel for the plaintiffs put the claim to relief, on the ground, that if the plaintiffs proceeded at law, to avoid the lease, they might be restrained, but this evidently was not the light in which the case was regarded by Lord Eldon, when it came before him at the hearing, he treated it simply as a case of specific performance (e).

So the Court has been in the habit of granting injunctions to prevent the violation of covenants in a farming lease, and that upon the ground of the covenant, and not of any particular case of waste, as was specially stated by Lord Eldon in *Lord Grey de Wilton v. Saxon* (f).

(c) 2 Ves. sen. 453.

(d) 5 Ves. 555.

(e) 6 Ves. 105.

(f) 6 Ves. 106. See *Lieben-*

rood v. Vines, 1 Mer. 15; *Kimpton v. Eve*, 2 V. & B. 349; *Pratt v. Brett*, 2 Madd. 62.

In these cases of farming leases the injunction will extend to the removing hay and straw contrary to agreement; this was refused by the Court of Exchequer in *Johnson v. Goldswain* (g), the Court saying, the carrying off straw and manure is merely a breach of contract; it is not a case of irreparable injury; but the fact that Courts of Equity interfered to prevent a breach of contract seems not to have been adverted to (h).

The Court is in the constant habit of restraining the carrying on a trade contrary to stipulation. The assistance of the Court is most frequently asked for in cases of the sale of the goodwill of a trade or profession, in which case the best mode of making the goodwill valuable is, by making it a condition that the withdrawing partner shall not carry on the trade within a certain distance of the place where the trade had been, and was proposed to be, carried on (i).

A Court of Equity has the power, by injunction, of executing such a negative covenant much more effectually than a Court of Law (j).

In *Morris v. Colman*, Lord Eldon said, in partnership engagements, a covenant that the partners shall not carry on for their private benefit that particular commercial concern in which they are jointly engaged is not only permitted, but is the constant course; and he enforced, by injunction, an agreement by Mr. Colman, not to write dramatic pieces for any other

(g) 3 Anstr. 749.

(h) See the decision of Lord Alvanley, in *Guest v. Lord Belfast*, 3 Anst. 750.

(i) Lord Eldon, in *Kennedy v. Lee*, 3 Mer. p. 452.

(j) *Barrett v. Blagrove*, 5 Ves. 555, 6 Ves. 105.

theatre than the Haymarket (*k*). So in the case of *Barfield v. Nicholson*, an author, having sold a work, covenanted with the purchaser not to publish any other work to prejudice the sale of it. Upon the ground of this covenant Sir John Leach, V. C., restrained the publication, by the author, of another work, on the same subject, although such work was no piracy of the original work, and Lord Eldon, C., restrained the publisher of the second work, on evidence that he had notice of the covenant (*l*).

The sale of the goodwill of a trade, without any express provision in restraint of the carrying on the same trade in the neighbourhood by the person selling, will not entitle the Court to restrain the vendor from carrying on the trade near, unless the circumstances amount to actual fraud (*m*).

In *Shackle v. Baker* (*n*), upon the sale of a goodwill, Lord Eldon remarked, "If there were nothing more than a purchase of the goodwill of a trade, the vendor would be at liberty to set up the same trade in any other situation. Against that the purchaser might require a covenant; but resting upon a covenant, he can have nothing more than an action for damages (*o*); and the observation that such an action is an extremely imperfect remedy, has been repeatedly made. The parties may, therefore, proceed to ascertain for themselves what shall be the damages from time to time; and, unless they are so awkward as to

(*k*) 18 Ves. 437.

(*l*) 2 S. & St. 1.

(*m*) *Cruttwell v. Lye*, 17 Ves. 335.
See *Williams v. Williams*, 3 Mer.
157; *Canham v. Jones*, 2 V. & B.

208.

(*n*) 14 Vesey, 468.

(*o*) *Scott v. Mackintosh*, 1 V. &
B. 508.

put that in the shape of penalty, instead of liquidated damages, there is a perfect and absolute remedy " (p). Now, this seems hardly to go the length admitted by Lord Eldon himself in other cases, and the principle that Equity will compel a specific performance of the agreement, by an injunction against its violation, is now too firmly established to be doubted (q).

In *Williams v. Williams* a coach master, having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from Reading to London: Lord Eldon, upon a bill filed for specific performance of the agreement, and for an injunction against the vendor running any coach from London to Reading, granted the injunction till the answer (r). His Lordship afterwards said, respecting the case, that with some doubt whether he was not degrading the dignity of the Court by interfering, he saw his way in that case; because one party had there covenanted absolutely against interfering with the business which he had sold to the other (s).

Again, in *Collins v. Plumb*, Lord Eldon admitted the jurisdiction; there the application for an injunction against a breach of the covenant was grounded upon the principle that each party is in conscience bound to perform the contract in specie; he refused the injunction, on the ground, that it was not against doing an act generally, but only so as to injure other parties, a question which must be decided on every

(p) 14 Ves. 468.

(q) *Bryson v. Whitehead*, 1 S.
& St. 74.

(r) 2 Swanston, 254.

(s) 2 Swanston, 331.

motion to commit for breach of the injunction (*t*). The same principle has been repeatedly admitted by that venerable authority (*u*).

The jurisdiction was not doubted in the *Duke of Bedford v. the Trustees of the British Museum*, which was a bill filed by the Duke of Bedford to prevent the trustees erecting buildings in violation of a covenant contained in an old deed, from the person under whom they claimed. Lord Eldon refused the injunction: he said, "The question was, whether the Duke must be content with a legal remedy for the purpose of obtaining compensation for any injury he may have sustained, or whether he has a right to the better mode of relief which a Court of Equity affords by injunction." He refused the relief, and the Master of the Rolls concurred with him, on the grounds of hardship and alteration of circumstances (*v*).

These cases of enforcing, by injunction, agreements not to do certain acts are very different from those cases where the Court interferes to restrain the continuance of a public or private nuisance (*w*), where the Court will interfere, if the threatened injury is irreparable; unless this is the case, the injunction will not go (*x*). But where the intervention of the Court is sought to restrain a party from violating his express agreement, the jurisdiction is exercised as of

(*t*) 16 Ves. 454.

(*u*) See *Wither v. Dean & Chapter of Winchester*, 3 Mer. 429; *Roper v. Williams*, T. & R. 18.

(*v*) 2 M. & K. 552.

(*w*) *Att. Gen. v. Nichol*, 16 Ves. 338.

(*x*) *Crowder v. Tinkler*, 19 Ves. 617; *Sutton v. Lord Montfort*, 4

Sim. 504; *Squire v. Campbell*, 1 M. & C. 486; *Wynstanley v. Lee*, 2 Sw. 343; *Earl Ripon v. Hobart*, 3 M. & K. 169; *Bonnett v. Sadler*, 14 Ves. 526; *Mayor of London v. Bolt*, 5 Ves. 129; *Grey v. the Duke of Northumberland*, 13 Ves. 236.

course. If there is an express agreement, the Court will enforce that at once (*y*). Specific performance in the latter case is as much of course as a contract for the purchase of land (*z*).

But the next class of cases present some difficulty, where the Court secures the performance of a positive agreement by an injunction in a negative form.

The difficulty is one which applies not only to the endeavour to enforce positive agreements by ordering acts to be done, but also to the ordering acts to be done to prevent public or private nuisance, waste, or irreparable injury. And whatever the Court has ordered to be done, on other grounds, it will order to be done, by reason of an express agreement, if damages are an inadequate remedy.

The first case is supposed to be *Robinson v. Lord Byron*, where an injunction was granted to restrain Lord Byron from maintaining or using the shuttles, flood-gates, erections, or other devices, so as to prevent the water flowing to the plaintiff's mill in such regular quantities as it had ordinarily done before the 4th of April. The effect of this must have been to make Lord Byron raise the dam-heads, so that the water should not escape (*a*).

Lane v. Newdigate (*b*) was the first case in which this application of the negative form of injunction to ensure the performance of a positive agreement, was distinctly avowed by the Court. The plaintiff was

(*y*) 2 P. W. 266; 10 Ves. 192;
Att. Gen. v. M. & L. Railway Com-
pany, 1 Railway Cases, 451.

(*z*) *Barfield v. Kelly*, 2 S. &

St. 3.

(*a*) 1 B. C. C. 588.

(*b*) 10 Ves. 192.

assignee of a lease, granted by the defendant, for the purpose of erecting mills, with covenants for the supply of water from canals and reservoirs upon the defendant's estate. The bill prayed that the defendant might be decreed to restore a cut for carrying waste waters, and to restore a stop-gate and the banks of a canal to their former height; and also to repair such stop-gates, bridges, canals, and towing-paths, as were made previously to the granting the lease. Lord Eldon, C., upon the motion for an injunction, expressed a difficulty, whether it is according to the practice of the Court to decree or order repairs to be done; and he said, "as to restoring the stop-gate, the same difficulty occurs. The question is, whether the Court can specifically order that to be restored. I think I can direct it in terms that will have that effect. The injunction, I shall order, will create the necessity of restoring the stop-gate; and attention will be had to the manner in which he is to use these locks; and he will find it difficult, I apprehend, to avoid completely repairing these works." The order was to restrain the defendant from hindering the plaintiff from using the canal contrary to the covenant, by continuing to keep the said canal, or the banks, gates, locks, or works of the same, respectively out of good repair, or by continuing the removal of the stop-gate.

In *Blakemore v. The Glamorganshire Canal Navigation (c)*, it was considered by Lord Eldon that the company's act of Parliament must be looked on as in

the light of a contract made by the Legislature, on behalf of every person interested in anything to be done under it. The bill, after stating that the water of the canal was supplied from the River Taff, which also supplied the works of the plaintiff with water, and that the defendants had widened and deepened the canal, prayed that the company might be restrained from doing any act for the widening the canal, or whereby the supply to the plaintiff's works might be diminished; and by supplemental bill, stating the enlargement of the canal basin, the plaintiff prayed that the defendants might be decreed to fill in the basin therein mentioned, and to restore it to the same state as it was in prior to the enlargement. It is stated in the report of the case of *Rankin v. Huskisson* (*d*), that the order there made for the removal of buildings which had been commenced was founded upon what had been done by Lord Eldon in the case of the Glamorganshire Canal; but it does not appear from the report of the latter case that his Lordship made any other order than to restrain the defendants from further widening or enlarging the basin, and to direct certain issues to be tried. These issues having been in favour of the plaintiff, he moved, before Lord Brougham, C., to restrain the defendants from continuing to leave the works of the canal out of repair. Lord Brougham, after referring to the cases, said, "This brings us to *Lane v. Newdigate*, which may be said to go to the very uttermost verge of all the former cases, and indirectly to order something to be done, by restraining

the party from continuing to keep certain works out of repair. That case appears to have been *ex parte*, and not at all argued. Lord Eldon himself suggested the difficulty of making an order that the repairs should be done. Sir Samuel Romilly said, it was no more, in effect, than Lord Thurlow had ordered in *Robinson v. Lord Byron*; but Lord Eldon appears to have thought otherwise, and he refused the order as prayed, directing it, however, in such a manner as to produce the same result, by making it 'difficult,' his Lordship said, 'for the defendant to avoid completely repairing their works.' I take leave to agree with Lord Lyndhurst in the opinion, that if the Court has this jurisdiction, it would be better to exercise it directly and at once; and I will further take leave to add, that the having recourse to a roundabout mode of obtaining the object seems to cast a doubt upon the jurisdiction. But *Robinson v. Lord Byron* affords very little countenance for the general proposition, for the injunction issued only a month after the alleged nuisance, and that nuisance was of a varying nature, not the erection of works always producing one effect, but a contrivance by which the defendant sometimes stopped the water, and at other times overflowed and endangered the mill, saying, that 'his object in doing so was to extort money from the plaintiff.' When we find these two cases so peculiarly circumstanced, and especially that, in the one confessedly coming nearest the point sought to be obtained by the present plaintiff, Lord Eldon felt the difficulty so insurmountable that he could not go over it, but went, as it were, round it; although we have no right to say there is not a

precedent for taking a similar course here, yet, surely, we may pause; and, without denying the jurisdiction, decline to exercise it."

Whilst this case was being discussed Lord Lyndhurst, C., had made an order upon a railway company, intending to carry, and having obtained an act of Parliament to carry, their railway over a mill race, by which he awarded an injunction, restraining the company from making over the mill race an arch of less dimensions than the arch recommended by the engineer's report (e).

In *Rankin v. Huskisson*, Sir L. Shadwell, V. C., having granted an injunction to restrain the prosecution of buildings which had been commenced on a piece of ground; it was asked that the order might provide for the removal of the buildings; the order made was to restrain the defendants from permitting such part of the said buildings as have been already erected on the said garden or plot of ground, from remaining thereon (f).

Lord Brougham afterwards in another case said, "I shall pursue the course I have always taken of not extending the power, which in cases of a peculiar nature, this Court has sometimes exercised, of ordering a thing to be done under the form of restraining parties from preventing it" (g).

Notwithstanding this adverse opinion, the practice has continued. In *Spencer v. The London and Birmingham Railway Company*, the bill prayed that the

(e) *Coats v. the Clarence Railway Company*, 1 R. & M. 181.
(f) 4 Sim. 15.

(g) *Milligan v. Mitchell*, 1 M. & K. 452.

company might be restrained from stopping up a road which they had actually stopped up; on a demurrer being filed, the Vice Chancellor, Sir L. Shadwell, overruled it. He said, "The power of the Court to grant that species of injunction which Lord Eldon granted, namely, restraining a party from allowing a thing to continue, and which has the effect of making him take some active measures, has been since recognised and acted on; and I don't see why, if that species of negative injunction has been adopted, it should not be adopted here, so as to prevent the parties from continuing the excavation in its present state, and from making the excavation greater. The injunction asked for, as far as it restrains the defendants from widening the excavation, is quite of the common sort; but so far as it seeks to prevent its continuance, it is of a negative kind, but it has been adopted by Lord Eldon" (*h*).

In *Taylor v. Davis* (*i*), where a partner had abstracted a partnership book from the counting-house of the firm, contrary to an express covenant contained in the deed of partnership, Lord Cottenham, then M. R., granted an injunction restraining him from continuing to violate the covenant; and this course seems to have been adopted in preference to a direct order to deliver up the book, such as had been made in *Lingen v. Simpson* (*j*). This was approved of by Lord Langdale, who made no objection to an injunction to restrain a defendant from keeping possession of books (*k*).

(*h*) 8 Sim. 193.

(*i*) 3 Beav. 388.

(*j*) 1 S. & St. 600.

(*k*) *Whittaker v. Howe*, 3 Beav. 383; see 398 (*n*).

So in *Squire v. Campbell*, the Vice Chancellor made an order for the removal of a hoard and the restoration of the pavement to its former state, and no objection was made to the exercise of this jurisdiction by Lord Cottenham, although he dissolved the injunction, on the ground of there being no sufficient evidence of the agreement, against a violation of which, it had been awarded (*l*).

In the *Great North of England Railway v. The Clarence Railway*, Sir James Knight Bruce, V. C., followed these cases, and directed an order to be made restraining the defendants from permitting certain of their works from remaining at a certain height. His Honor remarked, "It has been said that the injunction now sought is wholly mandatory, and therefore proper to be refused. That injunctions in substance mandatory, though in force merely prohibitory, have been and may be granted by the Court is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution, but certainly it is one fit and necessary, under certain circumstances, to be exercised. Under what circumstances it should be exercised must be a matter for judicial discretion, in each several case" (*m*).

The same language is used by Lord Langdale, M. R., in his judgment on the case of the *Earl of Mexborough v. Bower*: "This motion asks for something more than ordinary; namely, to restrain the defendants permitting water to flow through the communication. It is, however, no unusual thing to ask an injunction taking the personal estate and the rents and profits

(*l*) 1 M. & C. 465, 467.

(*m*) 1 Collyer, 522.

in this form: I think it was granted in the case of *Robinson v. Lord Byron* and other cases. Indeed, I believe that in another branch of the Court, some few years ago, a direct order was made for the party to do that which was required, to put an end to the violation of covenants: I do not, however, know whether that has been since acted upon, and I do not mean to deviate from the regular and established practice." His Lordship granted the injunction (*n*).

The third class of cases seem to establish the doctrine that upon positive agreements as to personal acts, a Court of Equity has jurisdiction to direct, by a simple mandatory order, those acts to be done which have been agreed to be done.

This jurisdiction has been very recently exercised, nor does there seem any objection in principle, why, if the agreement be definite and certain in its terms, the party agreeing should not be compelled positively to perform it.

It is the familiar doctrine of a Court of Equity, that it only acts upon the person of the defendant (*o*), and by its process against him compels the performance of acts necessary to do justice to the plaintiff; and the rule is, that it binds the person and not the estate, as a judgment of the Court of Common Pleas did. The Court of Chancery does not bind the interest in land, but enforces the party to perform his own agreement (*p*). The process of sequestration,

(*n*) 7 Beav. 130. This order was affirmed by Lord Lyndhurst on appeal.

(*o*) Daniel's Ch. Pr. 1st ed. vol. 1,

p. 689; Smith's Ch. Pr. 3rd ed. vol. 1, p. 566.

(*p*) *Wiseman v. Roper*, Vin. Ab. 5, 532.

of the real estate, was only to compel the party to do what he was directed to do. This was so clearly the principle of the Court, and the mode of its proceeding, that it entertained and still entertains questions as to property in other countries (*q*), out of the jurisdiction of the Court, and it interferes to stop proceedings in all Courts, and even in the Courts of other nations (*r*), acting in all cases upon the person of the defendant, if within the jurisdiction, and enforcing the performance of the decree by personal process, commitment, and sequestration, in case of disobedience.

Thus, in a case of a contract respecting land in the West Indies, the Court, although it cannot act upon the land directly, yet it acts upon the conscience of the person living here. The Court will exercise the same jurisdiction, in questions as to lands abroad, as if they were in England. Some early cases induce the notion, that the Courts assumed the jurisdiction only where the lands were within the British dominions (*s*); but it is now clearly established, that any equitable claim can be enforced by a Court of Equity against any person coming within its jurisdiction (*t*).

In *Holles v. Carr* (*u*), Lord Nottingham said, "this Court hath often decreed fines to be levied according to agreement, where the lands are to be specifically

(*q*) *Foster v. Vassall*, 3 Atk. 589; *Penn v. Baltimore*, 1 Ves. sen. 444; *Lord Cranstoun v. Johnston*, 3 Ves. 170; *Jackson v. Petrie*, 11 Ves. 104; *Stratton v. Davidson*, 1 R. & M. 485; and see *ex parte Prosser*, 2 B. C. C. 325.

(*r*) *Lord Portarlington v. Soulby*, 3 M. & K. 104.

(*s*) *Roberdeau v. Rous*, 1 Atk.

543.

(*t*) *Flack v. Holm*, 1 J. & W. 405; and see *York Building Company v. Mavor*, 1728, Vin. Ab. 5, 505; *White v. Hall*, 12 Ves. 321; *Pearne v. Lisle*, Amb. 77; *Foster v. Vassall*, 3 Atk. 589; *Robertson v. Wilkie*, Amb. 177.

(*u*) 3 Sw. 638.

enjoyed, as here they ought to be, till the portion levied or paid; and it is not fit to turn the plaintiff to a personal remedy, which may fail by death and want of assets, when the Court may decree a fine to be levied which is a real remedy": so in *Hall v. Hardy*, in *Peere Williams (v)*, the Court decreed a party, who had received money under an award, to do what he was directed, viz.: to execute a conveyance: and so the Court constantly interfered to compel the specific performance of a covenant for further assurance by ordering the execution of deeds proper for that purpose (*w*). This, in fact the Court, in the event of the continual refusal of the defendant, has a statutory power of effecting, by means of its own officers, who can execute a conveyance instead of the defendant (*x*).

It is the daily practice of the Court to order acts to be done, conveyances to be executed, money to be paid, and the only mode of enforcing the execution of the order, is by proceedings against the person. Equity has only control over land or property indirectly, by ordering the party to do with that land or property what is right. It is the peculiar jurisdiction of the Court to act in *personam*, a jurisdiction which enables it to deal with agreements relating to subject-matter itself quite beyond the power of the Court. It is the very foundation of the interference of a Court of Equity, that it can and does order acts to be done; and if the Court declines to compel the performance of

(v) 3 P. W. 189.

(w) *Taylor v. Dubuz*, 3 Bro. C. C. 596; *Hallett v. Middleton*, 1

Russ. 596.

(x) 1 Wm. 4, c. 36, rule 15.

agreements relating to personal acts, it is because the terms are uncertain and indefinite, or because, not being within the party's own power, they are impossible, or because damages for their non-performance would be an adequate remedy.

Of late years, indeed, the language of some Judges would induce the belief that there was something about the ordering an act to be done which in itself was objectionable and foreign to the practice of the Court, but it is not the act itself, but the nature of it, which renders the Court unwilling to enforce its execution. It may be laid down with respect to agreements to do personal acts, as with respect to other agreements, that if damages at law would be an inadequate remedy, and if the act is certain in its nature and capable of being performed by the party, performance will be decreed.

This jurisdiction has been most frequently discussed upon applications for the specific performance of agreements to build a house.

On this point, the first case generally referred to is *Holt v. Holt*. In that case, the plaintiff's father had contracted with a builder to build a house, covenanting to pay him £1000 for building it. Before the house was built, he died intestate, leaving plaintiff his son and heir, and his widow, who became his administratrix, him surviving; and the bill was filed by the heir to compel the administratrix specifically to perform the agreement. The real question between the parties was not decided, being whether the real or personal estate should pay for building the house; but it seems to have been admitted that the Court could direct the

house to be built (*y*). The next case was *Allen v. Harding*, where there is what Lord Rosslyn called an idea of a decree for specific performance of an agreement to build. A curate agreed with a builder to build a parsonage house on the glebe land. The objection taken was the uncertainty of the subject-matter of the agreement, a parsonage house; the Court considered it got rid of the uncertainty by referring it to two clergymen to define what is a proper parsonage house. It is clear that such a mode of removing an uncertainty would not be allowed now (*z*), but there was no objection made to the jurisdiction (*a*).

In *Pembroke v. Thorpe*, in 1740, Lord Hardwicke had the question brought before him: he said, "I think the agreement for building the house ought to be carried into execution. One objection is, that it would be very hard to oblige the defendant to build up a new house by applying to this Court, when the plaintiff might have his remedy at law, and recover damages for the breach of the agreement; and that a Court of Equity will not decree a specific performance which will be attended with great hardships." After alluding to the important fact, that there was no remedy at law, his Lordship adds; "There is no hardship in this case of which the Court will take notice. There are some cases indeed where, if the Court was to decree a specific performance, it would produce the ruin of the defendant, where a jury would not give the plaintiff 12*d.* damages. In such case a Court of Equity will not decree a performance.

(*y*) 2 Vernon, 222.
(*z*) *Supra*, Book 1, chap. 3.

(*a*) 2 Eq. Ab. 17; see 3 Ves.
186.

But this cannot be called a hardship, because it will put the defendant to an expense, for it is merely through his own default, and this Court only compels him to perform his own agreement which he had entered into for valuable consideration; and it would be suffering him to take advantage of his own wrong, if he were not compelled" (b). Here is a clear admission of the jurisdiction by this great Judge, which he also exercised in the case of the City of London v. Nash.

In this case the question was, whether the defendant had undertaken to pull down and rebuild certain houses belonging to the corporation of London, or only to repair them. Lord Hardwicke was of opinion that he was bound to rebuild them. It was objected on the part of the defendant, that the plaintiffs were not proper persons to come for a specific performance, and that they ought to be left to their action at law. "The objection," said the Lord Chancellor, "will not hold, for upon a covenant to build, the plaintiffs are clearly entitled to come into this Court for a specific performance, otherwise on a covenant to repair; for to build is an entire single thing, and if not done prevents that security which the city of London has for the rent, by virtue of the lease" (c). He, however, refused a specific performance on the ground of hardship, as the defendant had spent £2200 in repairing the houses, and only directed an issue *quantum damnificatus* (d).

In Errington v. Aynesley, there had been a bond for the performance of covenants to build a bridge,

(b) 3 Sw. 437 (n).
(c) 3 Atk. 512.

(d) 3 Atk. 512.

and as there being nothing on the bond, a bill was
filed to restrain the action and for an issue *quantum*
damni. The defendant urged that the Court
would never refuse against a penalty of this kind but
as the case is concerning the contract. Lord
Justice J. J. said - "You ever know a bill for
specific performance of a contract of this nature
that is to say a specific performance decreed on
a contract to build a house because if A. will not
build a specific performance is only decreed
when the thing is specific and cannot
be made specific. Now this must be under-
stood in relation to similar agreements between a
landlord and tenant concerning the house, where
there is a specific agreement and where
there is a general agreement in the relation between the
parties. The law should be ordered into by a
specific performance which is complete
and there is no difficulty in pro-
ceeding with the specific per-

the distinction taken by Lord Hardwicke seems sound, that the building is one single act, whereas specific performance of a covenant to repair, implies a constant and yet uncertain number of applications to the Court. The plaintiff, in *Lucas v. Commerford*, having no power of enforcing the covenant by an action at law, Lord Thurlow decreed the defendant to take an assignment of the lease (*f*).

In *Mosely v. Virgin* (*g*), the bill was for specific performance of an agreement to expend a certain sum in the building a certain house. Lord Rosslyn thought the agreement too uncertain to be specifically performed: he added, "It is commonly said, no decree for specific performance can be made upon a covenant to repair; and Lord Thurlow appears to have added, 'that he did not see how it could be made upon a covenant to build, being equally uncertain.' That certainly admits this qualification, if the transaction and agreement is in its nature defined; perhaps there would not be much difficulty to decree specific performance; but if it is loose and undefined, and it is not expressed distinctly what the building is, so that the Court could describe it as a subject for the report of the Master, the jurisdiction could not apply."

Lord Hardwicke's distinction, between an agreement to build and an agreement to repair, has been generally acquiesced in. Lord Eldon said, he agreed with Lord Thurlow, the Court could not order a specific performance of a covenant to repair (*h*).

(*f*) *Lucas v. Commerford*, 3 Bro. C. C. 66, 1 Ves. jun. 35; see 1 Mer. 264.

(*g*) 3 Ves. 184.
(*h*) *Lane v. Newdigate*, 10 Ves. 192; see p. 194, and 16 Ves. 405.

However, in the early exercise of its jurisdiction, the Court ordered repairs to be executed. In *Chapman v. Brown*, 23 & 24 Eliz., the tenant in possession wasted the houses, because he was dispunishable by reason of a mesne estate for life, he was decreed to repair two parts (i).

There is a case of *Lord Kilmorey v. Thackeray* (j), where Lord Kilmorey had granted lands on the river Dee, with a covenant in the lease to keep the banks in repair, so as to prevent the river breaking its bounds. In the Exchequer, the Court granted an injunction to compel the tenant to keep the banks in repair, as the verdict of a jury would be an imperfect remedy. They seem to have thought they could not decree specific performance in general cases, but that permitting the river to break its bounds was permission of waste; this, at least, is the reason given by Lord Kenyon, who cited the case with approbation in his judgment in *Bathurst v. Burdon* (k). In this last case, the bill was to force the lessees of the plaintiff to keep the sills of fish ponds in repair, and Lord Kenyon overruled a demurrer to the bill; he said, he should have been desirous, if compelled to it, to have made a precedent, but he was glad to be able to find that of *Lord Kilmorey v. Thackeray*. It is evident, therefore, that this Judge thought the Court had jurisdiction to decree repairs to be executed, a jurisdiction which has always since been repudiated, as the act is too indefinite: and that his reason for refusing specific performance of an agreement to build

(i) Tothill, 123. See *Marshall v. Holloway*, 5 Sim. 204.

(j) See 1 Bro. C. C. 65.
(k) 1 Bro. C. C. 64.

a house depended only on the fact, that one person could do it as well as another (*l*).

It is said, the Court will not order a wall to be pulled down (*m*). But, in the *East India Company v. Vincent*, Lord Hardwicke decreed a wall, erected by the defendant in violation of a permission given by him to build a house, being so constructed as to block up the lights of the house he had allowed to be erected, to be pulled down (*n*).

In *Pilkington v. Webster*, in the Duchy Court of Lancaster, 17 June, 1761, the Court ordered mills, querns, and engines, erected, set up, and used, for the purpose of grinding corn, grain, or malt, in evasion of a custom to grind at the Lord's mill, to be destroyed or abated (*o*).

In an anonymous case (*p*), before Lord Thurlow, a motion was made to compel a party to put every thing in the same state in which it was before, by filling up a ditch he had made, as well as to prevent his digging further. Lord Thurlow said, he would not order him to fill up this ditch before answer, and that he did not like granting these injunctions on motion. The ditch might be a mile long. His Lordship does not seem to have doubted the jurisdiction.

In *Flint v. Brandon*, however, Sir William Grant would not decree specific performance of an agreement to fill up a gravel pit, which was in the land of the plaintiff: but it was on the ground that

(*l*) 2 Bro. C. C. 341.

(*m*) Per Lord Lyndhurst, C., 9 Jur. 645.

(*n*) 2 Atk. 83.

(*o*) 4 Madd 114, and the cases there cited.

(*p*) 1 Ves. jun. 140.

complete justice could be done at law, Sir W. Grant said, "The matter in controversy is nothing more than the sum it will cost to put the ground in the condition in which, by the covenant, it ought to be" (q).

The difficulty of decreeing repairs to be done induced Lord Eldon to adopt the peculiar injunction which we have already alluded to, in *Lane v. Newdigate* (r), so as to make it difficult for the contracting party to avoid completely executing the repairs (s).

In a case before Sir John Leach, there had been an agreement for a real security, and the plaintiff filed his bill to compel the defendant specifically to perform it. The defendant stated his inability to give real security, but offered to give a security in personal estates: the plaintiff contended that the defendant was bound to give a real security, and that if he had no estates, he must, for that purpose, procure some. The Vice Chancellor decreed specific performance: he said, "If a man agrees to give a real security for a demand, he may be obliged specifically to perform his agreement, though he has no real estate, because he may procure it. It might be different where he agrees to give a security on an estate, called A., of which he is not the owner, because he may be unable to procure that very estate; but where, as in this

(q) 8 Ves. 159.

(r) 10 Ves. 192.

(s) In *Franklyn v. Tuton*, the defendant was lessee from the plaintiff of certain building ground, and covenanted that the house to be built by her should correspond with the adjoining houses already

built in its elevation. The bill was to compel the defendant, who had not conformed to the covenant, to alter the elevation accordingly. The cause was unopposed, and Sir John Leach, V. C., made a decree according to the prayer of the bill.

case, he agrees to give a real security generally, he has all the world before him, and must, therefore, purchase an estate to enable him to perform his agreement. In the common case of a husband, on marriage, covenanting to settle a real estate, of a particular value, on his wife and the issue of the marriage, if the husband has no real estate, he is compellable to procure one" (t). So, in *Howell v. George*, Sir T. Plumer, V. C., said, that if the defendant had expressly contracted to make a purchase of lands, such a contract might be enforced in Court (u).

From all these cases, the jurisdiction to direct the performance of personal acts, by a positive order, seems to have been constantly acted upon, and two cases have recently occurred, where it has been distinctly asserted.

In *Storer v. the Great Western Railway Company* (v), the company had agreed with the plaintiff, that if he would withdraw his opposition to their bill for a railway to cross his grounds, they would construct and maintain a neat arch-way, sufficient to permit a loaded carriage of hay to pass under the arch-way. The bill was for specific performance. The Vice Chancellor, Knight Bruce, said, "It is competent to this Court to interfere to enforce the specific performance of a contract, by a defendant, to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation. Damages would not be adequate compensation. In my opinion

(t) *Walker v. Barnes*, 3 Madd.

245. } .

(u) 1 Mad. 8.

(v) 2 Y. & C., C. C. 48.

the plaintiff has a right to specific performance, and it is competent to this Court to say, that the work shall be properly done. * * There is no difficulty in enforcing such a decree. The Court has to order the thing to be done, and then it is a question capable of solution, whether the order has been obeyed."

It may be remarked that, although the railway company was in possession of the soil upon which it was proposed to erect the arch-way, so that no amount of money received in damages would enable the plaintiff, who could not go upon the soil of the company, to carry out his object, yet that the approaches to the arch-way seem to have been ordered to be made on the plaintiff's soil.

This reasoning has been followed in the case of *Price v. the Corporation of Penzance*. There Sir Charles Price had sold ground to the corporation for £600, they, at the same time, covenanting to build a market. The market not having been built, Sir Charles filed a bill, praying that the corporation might be decreed to perform their covenant, by erecting, or causing to be erected, upon the ground, a good and commodious market for the sale of fish or other commodities. The Vice Chancellor Wigram said, "There is a difficulty upon the face of this bill, and one which commonly occurs in such cases; if I make a decree for the performance of the contract, how is the Court to know when the contract is performed? The contract was that the corporation, having purchased the plaintiff's land, should, at their own expense, make a street and also a market. Under the contract, the corporation have taken possession of the land and

converted it; and having had the benefit of the contract in specie, as far as they are concerned, I need not say, that the Court will go to any length which it can to compel them to perform the contract in specie. I should not decree the specific agreement without inquiries for the purpose of seeing what the present state of the ground is, and the means there will be of defining what the market should be in order to satisfy the covenant" (*w*).

The majority of personal agreements are, however, from their very nature, impossible to be specifically executed under the direction of the Court. Formerly the Court interfered much more than has been the recent practice. In the *East India Company v. Vincent*, Lord Hardwicke, directed that the company should employ Vincent double to any other packer during a certain term, provided he did the work at the same rate that people of the same trade would do. But this order was made only by consent, and would hardly be made now, and this, because the contract being to be executed entirely, on the principle we have already examined, of mutuality, the Court must also have ordered the packer to do his duty (*x*).

In *Clarke v. Price* (*y*) there was an agreement between Mr. Price and the plaintiff, that he should compose and write reports in the Court of Exchequer, and that the profits of their publication, which was to be undertaken by the plaintiff, should be divided between them. Upon Mr. Price reporting for other persons,

(*w*) 4 Hare, 506.
(*x*) 2 Atk. 83.

(*y*) J. Wilson's Chancery Cases,
2, 157.

a bill was filed, praying that Mr. Price might be decreed specifically to perform the agreement, by permitting the plaintiff to print and publish the reports of cases in the Court of Exchequer, so long as he should continue to compose and write the same, and to restrain him from printing and publishing, or employing any one else to print and publish the same. Lord Eldon thought this contract was one which the Court could not carry into execution (*y*). This was an agreement which expressly provides that Mr. Price shall write and compose reports of cases to be published by the plaintiff. His Lordship said, he had no jurisdiction to compel Mr. Price to write reports for the plaintiff. If he could not compel Mr. Price to remain in the Court of Exchequer, for the purpose of taking notes, he could do nothing: he was of opinion that he had no jurisdiction (*z*).

Again, in another case, Lord Eldon declined to restrain a coach-master from horsing a coach throughout, in violation of an agreement with the plaintiff, that the defendant should horse it part of the journey. His Lordship said, if he enjoined the defendant from bringing horses to convey the coaches between the limits in question, he must enjoin the plaintiff from

(*y*) *J. Wilson's Chancery Cases*, 2, 157.

(*z*) The Court cannot effectually enforce the specific performance of an agreement not to communicate a secret by injunction; for this would be of no avail, unless a disclosure were made to enable the Court to ascertain whether it was or was not infringed: for, if a party comes to the Court to complain of

a breach of injunction, it is incumbent on him first to shew that the injunction has been violated. If the Court granted an injunction in such a case, it had no means of enforcing its own orders. Lord Eldon, in *Newberry v. James*, 2 Mer. 446; see *Williams v. Williams*, 3 Mer. 159, and *Yovatt v. Winyard*, 1 J. & W. 394.

not bringing horses there. He could not restrain the defendant, unless he had the means of assuring him that he should find the plaintiff's horses ready (a).

Again, in the case of a company formed for the purpose of supplying water to a district; the plaintiff filed his bill, alleging that, in consequence of his refusing to pay what he thought an unreasonable sum for the water supplied to him, the company threatened to cut off his supply: the bill then charged that the company was bound to supply water to the inhabitants of the district on payment of a reasonable rate, and was not at liberty to sever from its mains, pipes laid on with their own consent, so long as the owners continued to pay the rate originally agreed upon; and that the old rate paid by plaintiff was reasonable, while that demanded was unreasonable; and it accordingly prayed, that the company might be decreed to continue to plaintiff his supply of water, upon payment by him, either of the rate originally agreed upon, or of such other rate as should be reasonable, if they were not bound to accept the old one; and for an issue at law; and for an injunction to restrain the company from severing the plaintiff's pipe from the main, or interrupting his supply of water. On an injunction being moved for, Lord Eldon declined to grant it. He asked, "Where is the mutuality? Could I, under this act, compel any one inhabitant to take water from this company? I apprehend I could not. If the Company do not choose to supply water I cannot compel them; and if the Legislature meant

(a) *Smith v. Fromont*, 2 Swan. 331.

to give me the right to do it (by right I mean a right by compulsory means to make them give a supply) it ought to have been taken care of in the act. I cannot, upon principle, do it without such a power" (b).

The subject received considerable attention from the Vice Chancellor of England in a recent case. Messrs. Kemble, the proprietors of Covent Garden Theatre, had agreed with the late Mr. Kean, that he should act for twenty-four nights at their theatre, and should not perform at any other theatre in London during his engagement; the terms of this agreement were complied with, except as to ten nights; before the agreement had been executed as to these, Kean acted at Drury Lane. The plaintiffs, therefore, filed their bill, praying that the defendant might be decreed specifically to perform his agreement, and that, in the mean time, he might be restrained from acting at Drury Lane Theatre. The Lord Chancellor granted an injunction *ex parte* against the defendant acting at Drury Lane, until he had acted the ten nights at Covent Garden, with liberty for the defendant to move to dissolve the injunction before the Vice Chancellor. The Vice Chancellor dissolved the injunction; saying the agreement is such an one as the Court cannot perform; and that unless the Court could perform the whole of it, it would not perform any part; he distinguished the case of *Morris v. Colman* (c), on the ground of there being a partnership there. "The bill is filed," said his Honor, "for the purpose of enforcing

(b) *Weale v. the West Middlesex Water Company*, 1 Jac. &

Walker, 363.
(c) 18 Ves. 439.

the performance of that agreement, which mainly consists in the fact of his [the defendant's] acting; and it appears to me that it is utterly impossible that this Court can execute such an agreement. In the first place, independently of the difficulty of compelling a man to act, there is no time stated; and it is not stated in what character he shall act, and the thing is, altogether, so loose that it is perfectly impossible for the Court to determine upon what scheme of things Mr. Kean shall perform his agreement. There can be no prospective declaration or direction of the Court, as to the performance of the agreement, and supposing Mr. Kean should resist, how is such an agreement to be performed by the Court? Sequestration is out of the question; and can it be said that a man can be compelled to perform an agreement to act at a theatre by this Court sending him to the Fleet for refusing to act at all? There is no method of arriving at that which is the substance of the contract between the parties, by means of any process which this Court is enabled to issue" (*d*). The Vice Chancellor relied upon this decision in another case where he said the Court could not perform an agreement for the personal service of a traveller (*e*).

In *Hooper v. Brodrick* (*f*), defendant had agreed to use and keep open the demised premises as an inn. The plaintiff obtained *ex parte* an injunction restraining the defendant from discontinuing, during the term, to use and keep open the premises as an inn.

(*d*) *Kemble v. Kean*, 6 Sim. 333. Sim. 340.

(*e*) *Kimberley v. Jennings*, 6 (f) 11 Sim. 47.

The Vice Chancellor, Sir L. Shadwell, dissolved the injunction, he said, "The Court ought not to have restrained the defendant from discontinuing to use and keep open the demised premises as an inn, which is the same, in effect, as ordering him to carry on the business of an innkeeper."

So in the case of *Baldwin v. The Society for the Diffusion of Useful Knowledge*. There was an agreement that Baldwin should publish maps from drawings to be furnished by the defendants. The plaintiff filed a bill to restrain the defendants from selling certain numbers of the maps which had been commenced. But the Vice Chancellor refused the injunction on its being moved for; he asked how he could compel the Society to furnish the plaintiff with drawings of maps, from the engravings and publishing of which they are to derive a profit? (*g*)

So the Court cannot compel the performance of the duties of receiver of a bishoprick (*h*), nor order a person to manufacture acids for the purpose of supplying another (*i*). These two positions were laid down where the Court was asked to interfere for the purpose of enforcing agreements, the terms of which respectively were that the parties applying for the Court's interference should act as receiver and manufacture acids.

It is clear that if the doctrine in *Hooper v. Brod-rick* is correct, the Court will not by an indirect order compel that to be done which it cannot order directly;

(*g*) 9 Sim. 393.

(*h*) *Pickering v. the Bishop of*

Ely, 2 Y. & C., C. C. 267.

(*i*) *Hills v. Croll*, 2 Phillips, 60.

and we have seen that those things which Lord Eldon and other Judges have ordered to be done by the negative form of injunction, have been also directly ordered, viz. ; repairing buildings and pulling down walls. In *Lidgett v. Williams*, Sir J. Wigram, V. C., seems to adopt the doctrine of *Hooper v. Brodrick*; a motion was made to restrain the defendant from proceeding with the ship "Magnet" to any other place than Liverpool. His Honor observed, with regard to the form of injunction which was asked, that if the plaintiff had applied in direct terms that he should order the captain to carry the ship to Liverpool, he could not, perhaps, on motion have done so, and added, that the Court did not like to grant injunctions, compelling the party indirectly to do a positive act (*j*).

It is laid down that the Court will specifically perform a contract of partnership (*k*), but the cases cited for that proposition by Mr. Collyer only go the length of shewing that the Court will compel the execution of a partnership deed; these are *Buxton v. Lister* (*l*), and *Hibbert v. Hibbert*, where Sir W. Grant only directed the Master to settle proper articles of agreement and an account (*m*).

The reason is clear; a contract of partnership is of an essentially personal character; on the lunacy of one partner the other may apply to the Court for a dissolution (*n*), and he himself cannot be kept to his part of

(*j*) 4 Hare, 456.

(*k*) Collyer on Partnership, 2d Edition, p. 131. Mr. Swanston's note, *Crawshay v. Maule*, 3 Sw. 517.

(*l*) 3 Atk. 385.

(*m*) Trin. Term, 1807; see *Hercy v. Birch*, 9 Ves. 359, and *Peacock v. Peacock*, 16 Ves. 49.

(*n*) *Jones v. Noy*, 2 M. & K. 125.

the contract (*o*). So in general a partnership is dissolved by the death of either party. It would be of ill consequence in general to say, that in articles of partnership in trade, where no provision for the death of either is made, they might subsist for benefit of an executor who may not have skill therein (*p*). There are three considerations between partners:—The share of each in the capital; the share of each in the goodwill; and the labour which each undertakes to devote to the business (*q*).

As the Court, therefore, cannot enforce the carrying on a partnership, generally if it orders an account, it must dissolve the partnership (*r*). The account was granted in *Richards v. Davies*, although no dissolution was prayed, and this case has been followed, but the Master of the Rolls said, "I can make no order for carrying on the partnership concern, unless with a view to dissolution" (*s*).

In England *v. Curling* (*t*), a bill was filed, praying that a partnership agreement, which had been acted upon, might be specifically performed; and Lord Langdale made a declaration that the agreement for a co-partnership was a binding agreement between the parties thereto, and ought to be specifically performed and carried into execution, and ordered and decreed the same accordingly: but the actual decree only went in terms to the ordering a proper partnership deed to be executed and

(*o*) *Waters v. Taylor*, 2 V. & B. 303.

(*p*) Per M. R. in *Pearce v. Chamberlain*, 2 Ves. sen. 34.

(*q*) Per Lord Lyndhurst, C., in *Besch v. Frolich*, 1 Phillips, 172.

(*r*) *Forman v. Homfray*, 2 V. & B. 329; *Marshall v. Colman*, 2 J. & W. 266; *Const v. Harris*, T. & R. 517.

(*s*) 2 R. & M. 347.

(*t*) 8 Beav. 129.

continuing an injunction which had been obtained against one partner, acting contrary to his agreement. The circumstances of the case made it most inequitable for the partner violating his agreement, to attempt to do so; but in the ordinary case of a mere executory agreement for a partnership, it may be doubted whether such an injunction could be granted (u).

The Court refuses to enforce an agreement to refer to arbitration. The Court will never direct by its decree an act over the execution of which it has no control. Suppose the Court were to decree that the defendant should name an arbitrator, how could it compel the execution of that decree? or even, if an arbitrator were named, how could it compel that arbitrator to act? Could it compel the arbitrator to agree upon a price? It is the constant doctrine of the Court never to interfere, where it cannot enforce the acts, which it is called upon to direct (v).

In *Crawshay v. Collins*, an order was made by consent that all matters in difference should be referred to arbitration, and delay taking place, a motion was made that the arbitrators might proceed in their reference. Lord Eldon said, "in what former instance has it ever been contended that this Court can make an order on them [the arbitrators] to proceed? an order for arbitrators to proceed is what I never before heard of" (w).

So again, if a party undertakes for the performance of acts which are not within his own power, a Court

(u) See *Dietrichsen v. Cabburn*, Ph. 52.

the decision, *Agar v. Macklew*, 2 S. & St. 415.

(v) Sir E. Sugden *arguendo*, and

(w) 1 Sw. 40.

of Equity can, in general, give no relief, but will leave the parties to law (*x*).

In *Townshend v. Lawton*, there was a covenant from a tenant for life and one of his sons, that the trustee to preserve contingent remainders should join in suffering a recovery. On a bill filed for the specific performance of the covenant, the trustee submitting to act, as the Court should direct, and the younger son objecting, the Court refused to order the trustee to join: the bill was dismissed as to him with costs (*y*). If he had been merely a trustee for the parties agreeing, it would have been a matter of course to direct them to procure the trustee to join in the assurance. A party having agreed that his trustee should execute a lease, a bill against him to procure the trustee to execute the lease will lie (*z*).

If the parties who contract to sell an estate represent all the equitable interest in the estate, they can make a good title, although they have not the legal estate; because the holders of the legal estate must be trustees for them and are bound to convey it as they shall direct. They cannot enforce the contract without getting in the legal estate, but this is merely a question of conveyance. If the contract is made with the person having the equitable estate, the equitable estate can be bound by a decree and the legal estate follows. Accordingly, if a person having the equitable interest enters into a contract, the Court will enforce

(*x*) *Peart v. Bushell*, 2 Sim. 38.
(*y*) *Costigan v. Hastler*, 1 S. & Lef. 160.

(*z*) *Bradshaw v. Sutton*, Colles,

P. C. 29. In this case an issue, *quantum damnificatus*, was directed as to loss to the plaintiff, from the lease not having been executed sooner.

it (a). If a person has the whole equitable estate in himself, and there is a trustee who has got the legal estate in him, if the question were, whether he who has got the equitable estate, has a good title, you would say, in common language, that he can make a good title; because he can convey the whole beneficial interest, and has a power of compelling a conveyance of the legal estate (b).

It is said, that where a father covenanted that his son, who was then under age, should convey lands to a purchaser, he was decreed to procure the son to convey on his coming of age (c); but this decision can hardly be now relied on (d). In *Hall v. Hardy* (e), Sir Joseph Jekyll, M. R., said, "there had been a hundred precedents where, if the husband for a valuable consideration covenants that the wife shall join with him in a fine, the Court has decreed the husband to do it, for that he has undertaken it and must lie by it, if he does not perform it." The ground is, said by Mr. Cox, in his note to this case, to be, because in all these cases it is to be presumed that the husband, when he covenants that his wife shall levy a fine has first gained her consent for that purpose. It is difficult to see the force of this reasoning.

The last case in which such a decree was made against a husband was *Morris v. Stephenson* (f). It was urged, that the practice of late years had not been in its favour, that no case was to be found from

(a) *Crop v. Norton*, 2 Atk. 74.

(b) Per Sir L. Shadwell, V. C. E., *Forbes v. Peacock*, 12 Sim. 548.

(c) *Anon.* 2 Cha. Ca. 53.

(d) *Howell v. George*, 1 Mad. 4; see *Evans v. Cogan*, 2 P. W. 451.

(e) 3 P. W. 189.

(f) 7 Ves. 479.

1733 to 1795. Sir William Grant repeated several times, that the wife executed the deed of covenant; that it was stated the covenant was entered into by the husband with her consent, and that he did not allege that he was unable to procure his wife to join; and the Master of the Rolls added, that if he refused the decree, he must go the length of saying, that because the husband was married, he should not be compelled to perform his covenant. This reasoning does not carry so much force as, in general, belongs to the judgment of that learned Judge (*g*). In *Emery v. Wase* (*h*), Lord Eldon pointed out the difficulties of the doctrine, and seemed unwilling to follow the judgment of Sir William Grant. Nevertheless he afterwards spoke of such cases being perhaps to be followed (*i*).

Succeeding Judges have, however, been never asked to decide the question. In *Milligan v. Mitchell* (*j*), Sir Thomas Plumer said, "the point that the Court should compel the husband to coerce the wife to join with him in the conveyance was abandoned: the counsel did not urge that that is the law now, and that the husband was to go to prison, if she refuses to concur. It is not necessary, therefore, to go into the class of cases upon that subject, the authority of which has been very much shaken by the remark of the Lord Chancellor (Eldon), upon the difficulty of a Court of Equity compelling her to consent to a fine, while

(*g*) The general rule being, that equity can only compel a party to perform acts within his own power.

(*h*) 5 Ves. 305.

(*i*) *Innes v. Jackson*, 16 Ves.

367.

(*j*) 1 J. & W. 426; see also *Frederick v. Coxwell*, 3 Y. & J. 514.

the Court of Common Pleas always examines her to ascertain whether she acts freely; and if they find her under constraint, still her consent must be taken, or the husband will be punished."

It is now decided, that the Court has no jurisdiction to make a peremptory order, that a married woman should execute a conveyance pursuant to a decree, and acknowledge it before a Master or Commissioner, in the form prescribed by the Fines and Recoveries Act (*k*).

The Court will not enforce the performance of an agreement, when, from its very terms, the interposition of the Court cannot effect the object which is sought to be gained; therefore, the Court will not execute an agreement for a partnership when the parties might dissolve it immediately afterwards, which is the case in all contracts of partnership for an indefinite period (*l*).

So a bill for specific performance of an agreement for a lease determinable upon notice was dismissed, upon the plaintiff, after answer, giving notice to the defendant pursuant to the terms of the agreement (*m*). This doctrine is very old. In *Praxis Cancellaria*, it is stated, that where a bill was exhibited in this Court, to compel the lord of a manor to grant a license to let a customary estate for years, according to the custom

(*k*) *Jordan v. Jones*, 2 Phillips, 170.

(*l*) *Hercy v. Birch*, 9 Ves. 557; *Crawshay v. Collins*, 15 Ves. 215; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Collins v. Plummer*, 1 P.

W. 104; *Hamilton v. Grant*, 3 Dow, 33. *Sup.* pp. 165-6.

(*m*) *Western v. Perrin*, 3 V. & B. 197; *Hill v. Barclay*, 18 Ves. 63.

of the manor, and the defendant averring, in his answer, that the plaintiff had forfeited his copyhold estate, the Court, thereupon, would not compel the defendant to grant a license, until it did appear whether the plaintiff had committed a forfeiture of his estate or not (*n*).

If during the existence of a lease such a breach of covenant is committed by a tenant, as that a Court of Equity would not have interfered to prevent the landlord from taking advantage of the forfeiture of the lease had he known of the breach and proceeded to determine the lease, he ought not to be placed in a worse situation after the expiration of the term, than he would have been in had he known of the breach and availed himself of it, before the term expired. In *Thompson v. Guyon* (*o*), a motion for an injunction against a landlord to recover possession of land held over by the tenant after the termination of a lease, the covenants of which had been broken, and there being a power of re-entry in their breach, and there being also an agreement for a lease for fourteen years to commence at the termination of the first lease was refused.

But if the breaches of covenant do not give a power of re-entry to the landlord, they are no answer to a bill for specific performance. Acts or omissions constituting only breaches of covenant which would not have entitled the lessor to enter and avoid the lease, as in *Hill v. Barclay*, are not reasons for refusing the

(*n*) P. 529.

(*o*) 5 Sim. 72.

specific performance of an agreement to grant the lease (*p*).

Thus an agreement by a lessee to assign the lease, assignment being expressly forbid by the agreement for a lease under which he held, was decided to be no bar to a bill for specific performance of the first agreement against the landlord. Lord Alvanley said, "An agreement to assign would not be a forfeiture of the lease if granted. If he had actually let a person live in the house, contrary to his covenant, that would be a forfeiture" (*q*).

If a party files a bill for specific performance of an agreement to purchase, and himself insists that the vendors cannot make a good title, if he does not choose to take the title which they can give, he can have no decree (*r*).

If in consequence of events that have happened, full effect cannot be given to an agreement, it will not be enforced. Each party must be placed by the decree in the position which they would have taken, had the agreement been originally carried out. If a tenant for life and remainderman agree to divide the estate, and the tenant for life remains in possession, the agreement will not be enforced, although entered into with a view of obtaining an advance of money (*s*).

Lord Hardwicke, in *Harvey v. Ashley* says, "if either of the parties fail in performance of the agree-

(*p*) Per Sir J. Wigram, V. C., *Walker v. Jeffreys*, 1 Hare, 351, cf.; *Gourlay v. Duke of Somerset*, 19 Ves. 431.

(*q*) *Williams v. Cheney*, 3 Ves.

59.

(*r*) *Nicolson v. Wordsworth*, 2 Swan. 365.

(*s*) *Rhodes v. Cook*, 2 Sim. & Stuart, 488.

ment in part, it cannot be decreed in specie, but must be left to an action at law" (*t*).

If there has been a part performance on the one side, the circumstance that the agreement cannot be fully performed on the other is no answer to an application by the party who has done his part.

In *Bettesworth v. The Dean and Chapter of St. Paul's*, an agreement had been made by the dean and chapter for a reversionary building lease of ninety-nine years; after this, the restraining statute of Elizabeth was passed, by which ecclesiastical bodies were restrained from granting leases for a longer period than forty years. A bill was filed to compel the dean and chapter to grant a lease for forty years. It was contended for the defendants, that this was an entire covenant and could not be apportioned and the bill was dismissed at the Rolls, but the decree was reversed on appeal to the House of Lords (*u*).

If the one party is in default, when he applies to the other to obtain a performance of the agreement, under altered circumstances; and those altered circumstances prevent the agreement being substantially performed, the Court will grant no relief. In the *City of London v. Mitford* (*v*), there had been a lease for forty years to the City, with a covenant for perpetual renewal on application a month before the expiration of the term, of certain lands on the banks of the Thames, which were, during the subsistence of the lease taken by act of Parliament for the approach to Blackfriars Bridge; and a long time after the term

(*t*) 3 Atk. 611.

(*u*) Sel. Ca. Ch. 66, 3 B. P. C.

389.

(*v*) 14 Ves. 41.

had expired, the City filed a bill for a renewal. Lord Eldon dismissed the bill, there being a covenant on the part of the City that they would leave the premises in good repair, if they did not renew: and this part of the agreement being impossible of execution, Lord Eldon considered their claim barred by their default in not demanding a renewal in proper time.

Lord Redesdale said, where the performance of the contract is sought by the defaulting party, he cannot enforce it against the person injured by his default. If a woman, upon her marriage, contracts for the settlement of her estate in a certain way by which the husband is to gain a benefit; and he contracts to make a settlement, and she appears not to have the estate she contracted to settle; the object of that contract being to give a larger settlement to her, that might be a case in which the wife should not be allowed to have the benefit of the husband's contract. He added, that should not affect the children, they must have the estate (*w*).

In *Powell v. Pillett*, where A. agreed to pay B. £200, within two years, on condition B. married his daughter and settled £600 upon her for a jointure to be laid out in land, and the marriage was had and there was issue, a daughter, but both mother and daughter died before the two years expired; the Court held upon B.'s bill against A. for specific execution, that it was in B.'s power to have entitled himself to the £200, when he had pleased, by laying out the £600, which not having done, he had not entitled

himself to a performance in specie by the other party, and dismissed the bill (*x*).

So, when Lord Feversham contracted to settle £2000 a-year upon his wife, by selling pensions and buying estates, and in consideration thereof, the wife's father agreed to settle £3000 a-year on Lord Feversham for life, and before the pensions were sold the lady died, without issue: on Lord Feversham's bill for specific performance, the Court refused relief, because Lord Feversham had not performed the whole of his agreement, and the other part was now become impossible (*y*).

This doctrine seems also to be recognised by Lord Hardwicke, in *Perkins v. Thornton* (*z*). There the wife's father contracted to pay his daughter's portion: the intended husband agreed to settle a jointure: the portion was not paid: the father died; then the husband died; and the wife then married the plaintiff *Perkins*, who brought a bill against the heirs-at-law of the husband, to have the articles for the jointure executed, and the Court decreed it. Lord Hardwicke said, "the wife had entered into no covenant to pay: she married upon the faith and credit of the articles, and performed the only thing she was to perform, by marrying, and ought to have the provision." Thus seeming to rest his decision upon the fact of the wife having entered into no obligation. In post-nuptial settlements, the covenants and agreements are clearly dependent (*a*). But it may be doubted whether the

(*x*) *Gilb. Eq. Rep.* 188.

(*y*) *Finch*, 445; *Powell on Contracts*, I. 20.

(*z*) *Amb.* 502.

(*a*) *Woodcock v. Monkton*, 1 *Coll.* 373.

Court has any right to interfere with a contract which has been, to such an extent part performed, as a marriage settlement is executed by the marriage, unless the language of those articles were clear and express that the portions were dependent on their mutual payment.

In the case of children, the rule is clearly in favour of their taking the interests secured to them, under a marriage settlement, notwithstanding any failure in performance of one of the contracting parties. Lord Hardwicke, in addition to the observations we have just quoted, in *Perkins v. Thornton* (a) said, "This Court has executed articles, in favour of children, against the father and his representatives, though he had not received the whole fortune of his wife. It is no reason that, because they have lost the benefit, they might have had by their father's receiving the portion, that they should be deprived of the other."

There is a difference between agreements on marriage being carried into execution and other agreements; for all agreements besides are considered as entire; and if either of the parties fail in performance of the agreement in part, it cannot be decreed in specie, but must be left to an action at law: in marriage agreements it is otherwise; for though either the relations of the husband or wife should fail in the performance of their part, yet the children may compel a performance. If the mother's father, for instance, hath agreed to give a portion, and the husband's father hath agreed to make a settlement; though the mother's father do not give the portion, yet the

(a) Amb. 502.

children may compel a settlement, for non-performance on one part shall be no impediment to the children's receiving the full benefit of the settlement; so, if there be a failure on the part of the father's relations, it is the same; all the Court could do in that case would be to lay hold on such estate as he should claim towards making good his proportion of the settlement: for the children, considered as purchasers, are entitled to all the benefit of the uses under the settlement, notwithstanding there has been a failure on one side (*b*).

The language of Lord Cottenham, in *Lloyd v. Lloyd*, confirms this view: he says, "It was hardly attempted to be disputed (and all the authorities in effect prove) that, with respect to marriage contracts, there can be no resistance on the part of one, because another contracting party has failed to perform his part of the agreement; and the obvious reason is, that the parties to the contract are not the only persons having an interest in the subject, but the contract is made by them on behalf of the issue of the marriage. Although, therefore, in the case of an ordinary contract, a party who has not performed his part may not be entitled to claim the benefit of it against the other party: it is different in marriage articles, where the two contracting parties reciprocally enter into contracts, both of which are made for the benefit of a third party. Unquestionably, however, even in the case of a marriage settlement, the covenants may be so framed as to be mutually dependent; and if it be

(*b*) Per Lord Hardwicke. *Harvey v. Ashley*, 3 Atk. 607, see p. 611.

clear, on the face of the settlement, that such was the intention, that intention must prevail" (c).

In *Clough v. Clough*, both the husband and wife's estate being agreed to be settled so as to raise £12,000 for the younger children, and the wife's estate being withdrawn, Lord Alvanley, M. R., would not allow more than £6,000 to be raised out of the husband's estate, which had passed to his eldest son. He said, the eldest son was as much a purchaser under the articles, and just as much an object as the others, and that he ought to be as much an object of the care of the Court: that the articles directed the £12,000 in the event of there being no issue male, to be raised in moieties out of each estate: and that the meaning of the articles was, if the estates were ever divided, as they would be in that given case, one estate should bear one moiety of the charge, and the other should bear the other moiety (d).

(c) 2 M. & C. 20; S. C. 8 Sim. 7.

(d) 5 Ves. 715.

CHAPTER IX.

The Contract must be one proper to be executed.

IN order to give an agreement an obligatory force, and fit it to produce an action in a Court of Justice, the subject of it ought to be such a thing as men have a lawful right and power of stipulating about at their pleasure. It follows that an engagement to do a thing, in itself unlawful, must be void; for it would be absurd that an obligation which derives its sanction from the law, should put men under a necessity of doing something which the law prohibits. No Court would enforce an agreement by which, if carried into execution, the parties would be compelled, under the powers of a Court of Justice, to do that which, in the view of justice, is criminal (a).

Of course equity must follow the law upon questions of legality or illegality; and it will not enforce a contract which, on such grounds, are void at law (b).

It will, therefore, be foreign to the purpose of this Treatise to detail the various kinds of contracts which Courts of law and equity deem illegal. I may content myself with stating the general principles in this respect common to both jurisdictions.

(a) Per Lord Eldon, in *Wood v. Griffiths*, 1 Sw. 43; see p. 55.

(b) *Woodward v. Miller*, 2 Coll. 283.

Writers on this subject generally divide unlawful contracts into those that are to do something that is *malum in se*, or *malum prohibitum*; but the distinction is of no importance in the law of England as to executory contracts, for any contract to do a thing forbidden by statute is as completely void to all intents and purposes as if it were a thing forbidden by what are called the laws of nature; and it is not even necessary that the statute should do more than inflict a penalty upon the transaction.

This is clearly laid down by Lord Cottenham in *Ewing v. Osbaldiston* (c). The bill was for an account of the profits of unlicensed dramatic representations. His Lordship observed, "It was said that the act does not in terms prohibit such representations, but only imposes a penalty. The Chief Justice of the Common Pleas in *De Begnis v. Armistead* (d) has answered this argument, founding his opinion upon the high authority of C. J. Holt, in *Bartlett v. Vinor* (e), and of Lord Ellenborough in *Langton v. Hughes* (f). In *Bartlett v. Vinor*, Lord Holt says, 'Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.' In *Langton v. Hughes*, Lord Ellenborough says, 'What is done in contravention of the provisions of

(c) 2 M. & C. 81.

(d) 10 Bing. 107.

(e) See Carth. 252.

(f) See 1 M. & S. 596.

an act of Parliament, cannot be made the subject-matter of an action. In *Gallin v. Saborie* (*g*) it was held, that no action could be maintained upon a contract to dance at a theatre not duly licensed. In *De Begnis v. Armistead*, it was decided, that an action could not be maintained upon a bill, the consideration for which was the balance of an account between the plaintiff and the defendant, who had joined in representing operas at an unlicensed theatre, several cases have been decided upon the same principle relating to transactions in illegal insurances, as *Mitchell v. Cotchbourne* (*h*). In *Knowles v. Haughton* (*i*), a bill seeking to establish a partnership in underwriting, contrary to the statute, was dismissed. Upon the same principle, in *Thompson v. Thompson* (*j*), Sir W. Grant dismissed a bill upon a contract for the sale of the covenant of an East India ship, saying, 'you cannot stir a step but through the illegal agreement, and it is impossible for the Court to enforce it.' Again, in *Chitty v. Browne* (*k*), a bill by a banker for an account of certain other trading speculations carried in for him in the name of the defendant, was dismissed, bankers being, by an Irish statute, prohibited from engaging in any such business. * * It is, therefore, impossible that the plaintiff can be entitled to any decree which shall be founded upon or growing out of this contract" (*l*).

(*g*) 5 T. R. 242.

(*h*) 2 H. Bl. 379.

(*i*) 11 Ves. 168.

(*j*) 7 Ves. 470.

(*k*) 1 Ball. & B. 360.

(*l*) See some discussion as to the giving colourable qualifications for

seats in Parliament, killing game, &c. *Birch v. Blagrove*, Amb. 264; *Cecil v. Butcher*, 2 J. & W. 565; *Brackenbury v. Brackenbury*, 2 J. & W. 391; *Groves v. Groves*, 3 Y. & J. 169.

The Court has always most scrupulously refused its assistance where the case made by the plaintiff is founded upon agreements either against law or policy, or contrary to that good faith which is expected to be preserved in the different relations of life. The Court will never give its sanction to such agreements by allowing them to appear on the record as the foundation of its decree (*m*).

Wherever the consideration, which is the ground of the promise, or the promise, which is the consequence or effect of the consideration, is unlawful, the whole contract is void.

All contracts that are entered into with a view to evade the law are vicious; thus a wager with a person having interest to procure an office that the person desiring the office should not get it, being a mere colour to disguise the purchasing the office is void at common law (*n*).

All contracts that have a fraudulent object in view, are, upon the same grounds void both at law and in equity; thus contracts whose object is to impose on third parties are void. Therefore a bill in equity for an allowance for attendance at auctions to enhance the price of goods will be dismissed with costs (*o*).

A contract is unlawful, if the object of it be, to induce the omission of something, the doing of which is a duty in the person with whom it is made.

A contract or agreement is unlawful, if it be to encourage unlawful acts or omissions; an agreement

(*m*) Woodhouse v. Meredith, 1 J. & W. 215.
(*n*) Per Lord Mansfield, Cow-

per, 39.
(*o*) Walker v. Nightingale, 4 Bro. P. C. 193.

between two parties that a third person shall do an unlawful act, or shall omit doing his duty, is void. It is a fundamental maxim of law, that you shall not stipulate for iniquity (*p*).

If the subject of a contract or an agreement be one prohibited from being an object of contract by statute, the contract or agreement is, as we have seen, void at law.

There are numerous cases in which these rules are varied and extended by Courts of Equity. Considerations upon which actions may be maintained at common law, will yet obtain no countenance in equity, and are no ground for a decree for specific performance of contracts founded upon them.

Lord Bacon's 15th Order directs, "that all suits grounded upon long leases that tend to the defacing of the king's tenures, for the establishing of perpetuities, or grounded upon remainders put into the Crown, to defeat purchasers; or for brokerage or reward to make marriage; or for bargains at play and wagers; or for bargains for office contrary to the statute of 2 Edw. 6; or for contracts upon usury or simony are regularly to be dismissed upon motion, if they be the sole effect of the bill."

Undoubtedly at first, when the distinction between Courts of law and equity was less marked than it is now, the Courts of law took those enlarged views upon this subject, which have since been more peculiarly the

(*p*) *Fletcher v. Soudes*, 1 Bligh, N. R. 183; per Hullock, B., *Collins v. Blantern*, 2 Wils. 348. See observations of Lord Eldon in *Fox*

v. Bishop of Chester, 3 Bligh, N. R., 123, quoting *Barrett v. Glubb*, 2 Black. 1052.

honour of Courts of equity. "Equitie," said Lord Coke, who quotes Bracton, "is a construction made by the Judges, that cases out of the letter of a statute, yet being within the mischief or cause of making of the same shall be within the same remedie that the statute provideth; and the reason hereof is, for that the law makers could not possibly set downe all cases in expresse terms" (q).

And so the Courts of Equity, taking their general rules of illegality from the common law have so extended the application of them, whether arising from the fundamental maxims of the law or particular statutes, that contracts which are valid at law are yet invalid in equity. Thus a marriage brokerage bond may be made the subject of an action at law, although it will be decreed to be delivered up in equity.

Equity looks at the object of the rule of law and excludes every contract which tends to an object of a similar nature to that prohibited by the rule of law.

I shall mention some cases where the Court has refused to enforce contracts which are within the mischief of particular statutes.

The statute 5 & 6 Edw. 6, declaring all bargains for the sale of any public office void, has been extended by Courts of Equity, to making illegal agreements for the buying a recommendation to such offices; and upon the ground that the party who thus pays for his office, does not, in fact, get the emolument attached to it, and that merit, industry, and fidelity, which ought to recommend persons, are thus disregarded (r).

(q) Co. Litt. 24, b.

(r) *Harrington v. Du Chatel*,

1 B. C. C. 134, and 2 Sw. 159;
Morris v. McCulloch, Amb. 432.

An assignment of an office is bad, because either the duties are performed or the emoluments received by other than the person appointed. If an office is not assignable at law, an assignment of the profits of that office being very little different cannot be supported (s).

In *Grenfell v. The Dean and Canons of Windsor* (t), Lord Langdale, M. R., said, "there are various cases in which public duties are concerned, in which it may be against public policy that the income arising for the performance of those duties should be assigned; and for this simple reason, because the public is interested, not only in performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the cases of half-pay, where there is a sort of retainer, and where the payments which are made to officers from time to time, are the means by which, they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for performing their duties. If, therefore, they were permitted to deprive themselves of their half-pay, unable promptly to enter upon their duties when called upon, the public service would be thereby greatly injured. So also, where a pension or remuneration is given for a purpose which tends less directly to the public benefit, as for instance was the case in *Davis v. The Duke of Marlborough*: there the pension was given to

(s) *Bellamy v. Burrow*, Rep. temp. Talbot, 97; *Hartwell v. Hartwell*, 4 Ves. 818.

(t) 2 Beav. 544. The cases are collected in *Friddy v. Rose*, 3 Mer 90, and *Davis v. Duke of Marl-*

borough, 1 Sw. 74; see also *Methwold v. Walbank*, 2 Ves. 238; *Arbuthnot v. Norton*, 10 Jur. 145; and *King's College v. Feistel*, 16 L. J. Rep., N. S., Ch. 339; *Palmer v. Vaughan*, 3 Sw. 173.

the Duke of Marlborough, as a memento of the gratitude of the nation, and as a reward for his distinguished public services: and it was there the intention of the Legislature that it should be kept in mind that it was for those great services it was given. In that case the pension was held inalienable, because it was considered that one of the objects of giving the pension, namely, for having a perpetual memorial of national gratitude for public services would be entirely lost, and so in the course of that case Lord Eldon said, in the way of illustration, and in allusion to the pension of a great public officer, that it could not be aliened, because that public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office" (u).

In the case of *Cooper v. Reilly* (v), both the Vice Chancellor and the Lord Chancellor, on appeal, refused to appoint a receiver of the salary of an assistant Parliamentary Counsel to the Treasury. The Vice Chancellor holding it to be within the doctrine of *Davis v. Duke of Marlborough*; the Lord Chancellor rather deciding the point upon the ground that no action could be maintained for the recovery of the allowances, and that no legal proceeding could be enforced against the Lords of the Treasury to compel them to pay it. The Lord Chancellor's doctrine coincides with the view taken of the matter by Lord Kenyon, who said, "Emoluments of this sort are granted for the dignity of the State and the support

(u) P. 549.

(v) 2 Sim. 560, 1 R. & M. 560.

of those who are engaged in the service of it, and it would be therefore impolitic to permit it to be assigned; besides, an officer has no certain interest in his half-pay; for the King may, at any time, strike him off the list" (*w*). But it may be submitted, whether the uncertainty of the duration of the annuity can be any ground for not compelling its assignment, or of holding the assignor a trustee of so much of the annuity as he should receive for the assignee. It might indeed be a question, if a party could be compelled to pay for the purchase of such an uncertainty, and it would be necessary in such a case to shew that the party knew exactly the nature of what he was buying: if he did, we have seen that the Court could even compel him to purchase an allotment not yet made, or which, being made, might be varied by the award (*x*). The decision in *Cooper v. Reilly* only proves that the Court, which would hardly exert its jurisdiction in vain, will not appoint a receiver, when the thing to be received is doubtful. However, upon the cause coming to a hearing, the Master of the Rolls directed a case to be stated for the opinion of the Court of Common Pleas, as to whether the salary was or was not an interest capable of being legally assigned, and Lord Langdale said, the question in the cause is, whether the salary was assignable on grounds of public policy (*y*). And we afterwards find in the case of *Tunstall v. Boothby* (*z*), where it was argued

(*w*) *Lidderdale v. Duke of Montrose*, 4 T. R. 248.

(*x*) *Mortimer v. Capper*, 1 Bro. C. C. 156; *Kingsley v. Young*, 17

Ves. 468.

(*y*) *Grenfell v. Dean and Canons of Windsor*, *ubi sup.*

(*z*) 10 Sim. 540.

that the allowance was payable only during pleasure, and was, therefore, not assignable, being an expectancy, the Vice Chancellor, Sir L. Shadwell, said, "Expectancies are assignable in equity" (a).

It follows from the doctrine that military pay is not assignable, that an officer can neither pledge nor mortgage his commission. That commission is the mere personal authority for the officer named in it to act; in the hands of a stranger it is mere waste paper, conferring neither authorities nor rights; and the Master of the Rolls, in *Collyer v. Fallon*, said, "It is of importance that it should be generally understood, that this Court will not entertain the doctrine that an officer, while he remains in the service, can lawfully part with his commission, by way of pledge or mortgage, or that he can, by so doing, give the depositary any rights with respect to it" (b).

It has been decided that prize money is not in the nature of military pay, and is assignable in equity, and that too before any interest has been vested in the captor by a grant from the Crown (c).

In the case of *Ellis v. Earl Grey*, the compensation awarded under an act of Parliament for the office of side clerk of the Exchequer, which was abolished by the act, having been assigned, the Vice Chancellor overruled a demurrer by the Lords of the Treasury to a bill filed to restrain the Lords of the Treasury from paying it to other persons than the plaintiff, saying, that there was no proof or allegation that the

(a) See *Douglas v. Russell*, 4 Russ. 468.
Sim. 524.

(c) *Alexander v. the Duke of Wellington*, 2 Russ. & M. 35.

(b) *Collyer v. Fallon*, Turn. &

office was not assignable, and that the Lords of the Treasury were mere stakeholders (*d*). In *Tunstall v. Boothby*, the Vice Chancellor granted an injunction to restrain the Receiver General of the Customs from paying monies in his hands on account of a compensation allowance to a retired officer of the customs which had been assigned. He said, "This Court had given effect to an assignment of even military full pay, with respect to money which was actually in the hands of the agent for the party who had made the assignment; for in *Spencer v. Cox and Drummond* (*e*), an officer in the army had assigned his pay to the plaintiff to secure an annuity, and had given notice to the defendants, the agents of his regiment, to pay it over to the plaintiff. The officer being abroad on service, the plaintiff demanded payment of the arrears of the annuity from the defendants; and on their refusing he filed his bill. The defendants proved that officers in the army were at liberty to take up their pay from the regimental paymaster, and that the agent was answerable over to him. The Master of the Rolls, however, decided that the defendants should pay the money in their hands, in discharge of the arrears of the annuity, and should discharge the growing payments of it, out of such monies as they should receive on account of the assignor. But the Lord Chancellor varied the decree, by ordering the defendants to discharge the annuity out of what should remain in their hands after satisfying the demands of the paymaster; so that the Court gave the assignee the benefit of his lien with

(*d*) 6 Sim. 219.

(*e*) 2 Anstruther, 535, note.

respect to the balance." The Lord Chancellor affirmed the Vice Chancellor's order on appeal, observing, that it applied only to monies in the Receiver General's hands, and that it did not amount to any declaration of right as to future payments, payable to the assignor or to some person under him (*f*).

Under the Insolvent Debtors' Acts there are powers given to the commissioners, with the assent of the authorities of the respective government offices to which the insolvent belongs, to apply a certain portion of half or whole pay, pensions or allowances to the discharge of his debts (*g*).

In the *East India Company v. Neave* (*h*), the Lord Chancellor said, "the command of an East India ship was a public trust; being the command of a ship of the company, who alone have a right to trade to India, and the selling that contrary to a public regulation of the company is a public act, and a breach of a public duty, an attempt to enforce such an agreement will be dismissed with costs" (*i*). In *Money v. Macleod* (*j*) the Vice Chancellor directed an issue as to whether an agreement to share the profits of the command of an East India ship was entered into, either wholly or partly, in consideration of assistance rendered or supposed to be rendered in procuring the command of the ship, implying, as otherwise the issue would be useless, that the Court would not direct an account, on the footing of an agreement for such a consideration.

(*f*) 9 L. J. Reports, N. S. Ch. 294, before the Vice Chancellor; also 10 Sim. 542.

(*g*) *Ex parte Battine*, 4 B. & Ad. 690; 7 Geo. 4, c. 57, s. 29; 1 & 2

Vict. c. 110, s. 56.

(*h*) 5 Ves. 173.

(*i*) 7 Ves. 470.

(*j*) 2 Sim. & Stu. 301.

So agreements for the sale of ships, or for a share of the profits of the command against the policy of the ship register acts cannot be supported (*k*). There can be no such thing as an equitable title to a ship; if the ship is at sea, and all the requisites of the registry acts have been complied with, which are capable of being performed in the absence of the ship, the title passes at law, subject to be divested, if the additional requisites in the return of the ship are not complied with (*l*).

It may be considered as clear that equity would not enforce an agreement for the transfer of an office of private trust, or for giving a share of the profits because this amounts to a fraud upon the person making the appointment; equity will not sanction the assignment of the guardianship of an infant (*m*). In those cases where the office is a public one. Lord Alvanley intimated a doubt whether the privity of the person at the head of the department to which the officer belonged, could sanction the agreement to pay a sum of money out of the profits of the office for a money consideration (*n*).

The Court will not perform agreements founded on maintenance, the maintaining or assisting a party to a suit, with money or otherwise, especially that species of maintenance which is called champerty, "the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it;" as it is defined by Sir Wm. Grant (*o*) from Hawkins'

(*k*) *Osborne v. Williams*, 18 Ves.

379; *Brewster v. Clarke*, 2 Mer. 75.

(*l*) *Dixon v. Ewart*, 3 Mer. 322.

See 7 & 8 Vict. c. 88, sec. 34.

(*m*) *Villareal v. Mellish*, 2 Swanst.

533.

(*n*) *Hartwell v. Hartwell*, 4 Ves. 811.

(*o*) *Stevens v. Bagwell*, 15 Ves. 156; *Hawkins*, P. C. I. 537.

book, or, as Lord Cottenham defined it, "an agreement to divide property in litigation" (*p*). Maintenance is punishable by an action at common law; there are statutes prohibiting particular species of maintenance, which add penalties, (such as the Bill of Bracery and Buying of Titles, 32 Hen. 8, c. 9), but it is laid down as a fundamental authority, that maintenance is not *malum prohibitum*, but *malum in se*; that parties shall not by their countenance aid the prosecution of suits of any kind which every person must bring upon his own bottom, and at his own expense. Therefore Lord Loughborough allowed a demurrer to a bill stating an agreement by the Duke of Bolton to pay the expense of Mr. Tierney's prosecuting a petition against the return of a member of Parliament, by whom he had been defeated; his Lordship said, that if the discovery was made it would be *malum in se*; and that he was of opinion it was not fit for a Court of Equity to permit the suit to proceed any further (*q*).

A plea of the statute, 32 Hen. 8, against contracting for pretended or controverted rights was held good by Lord Talbot and also by Lord Eldon (*r*).

(*p*) *Persse v. Persse*, 7 Cl. & Fin. 316.

(*q*) *Wallis v. Duke of Portland*, 3 Ves. 494; not law, per Rolfe, B. in *Findon v. Parker*, 12 L. J. Rep., N. S. Exch. 446.

(*r*) *Sharp v. Carter*, 3 P. W. 375; *Hitchins v. Lander*, Coop. 34; *Wall v. Stubbs*, 1 Madd. 80; on another point, 2 V. & B. 357. In *Doe d. Williams v. Evans*, 1 C. B. 717, an objection, founded on

the statute 32 Hen. 8, was held fatal. Tindal, C. J., said, "It appears to me that this is a case within the statute 32 Hen. 8, and one which it was the object of that statute to prevent. It is the case where one person is in possession, and a third person purchases of another a right of entry, and thereupon brings an action of ejectment against the person so in possession." In *Underwood v. Cour-*

Whether an agreement actually amounts to the offence of champerty is a question of law, but Lord Northington refused to allow a transaction on the ground of its savouring of champerty, and Lord Eldon approved of the decision, which is thus stated by Lord Eldon:—
 “In a case in 1767, not in print, *Strahan v. Brandon*, the plaintiff, by descent a Swede, but born in England, claimed, as heir of a Swede, a large estate; being in indigent circumstances he applied to Willis, an attorney, who agreed to undertake his cause, if a record could be procured. A subscription was proposed, and Willis became one of the subscribers upon these terms, that the plaintiff, if he succeeded, should pay the subscribers, and among them Willis double the sums advanced; and if he failed, the subscribers were to lose their money, a bond was given with a penalty of £4000, and £1000 was advanced. That case was before Lord Northington, who decreed that the bond could not be permitted to stand as a security for more than the £1000 actually advanced, stating, in his decree, that this transaction, though not strictly champerty, was so near it, that it could not be permitted to prevail, declaring, that it savours of champerty, and is therefore, dangerous to public justice.” “That,” adds Lord Eldon, “has been once followed,” and he directed an agreement, which he said savoured of champerty, to be cancelled, though this was bad on other grounds (s).

town, 2 Sch. & Lef. 65, Lord Redesdale says, “a person out of possession cannot, in law, convey anything to a stranger, he can only give a release to one in possession.” The statute but affirms the doctrine of the Common Law respect-

ing choses in action. Co. Litt. 214, a.; see *Spragg v. Binkes*, 5 Ves. 583.

(s) *Wood v. Downes*, 18 Ves. 120; see *Powell v. Knowler*, 2 Atk. 224.

But the application of these doctrines has been a good deal narrowed in practice, especially in recent decisions. A party interested in the subject-matter of the suit may, although not a party to the suit, advance money to support the title (*t*). In particular, the Courts have not been willing to extend the operation of the statute against buying pretended or controverted titles (*u*). In *Harrington v. Long*, Sir John Leach, M. R., says, "There is no principle which prevents a person from assigning his interest in a debt after the institution of a suit for its recovery. Maintenance is where there is an agreement, by which one party gives to a stranger the benefit of a suit, upon condition that he prosecutes it. In *Wood v. Downes*, Lord Eldon thought this was done indirectly; in *Hartley v. Russell* (*v*), it appeared to me that it was not done. Maintenance is properly discouraged, because it promotes litigation and tends to oppression. But the mere assignment of the subject of a suit cannot be considered as maintenance. Such an assignment gives the person to whom it is made a right to institute a new proceeding, in order to obtain the benefit of the assignment" (*w*). So, by the strict rules of the Common Law, a chose in action could not be assigned, because it would be an encouragement to litigiousness, but this was early disregarded in equity. In *Wood v. Griffith* similar language is used by Lord Eldon: "If Griffith and Wood, during the pendency

(*t*) *Sharp v. Carter, ubi sup.*

(*u*) See *Anson v. Lee*, 4 Sim. 364, where the Vice Chancellor said, "There are many things which a man may release which he

cannot convey." See *Prosser v. Edmunds*, 1 Y. & C. 481.

(*v*) 2 Sim. & Stuart, 244.

(*w*) *Harrington v. Long*, 2 M. & K. 590.

of the suit in the Exchequer, sold the estate to A. B., he would have a right in a Court of Equity, to insist, as purchaser of the estate, that they should convey to him the fee simple or such estate as they had: so insisting, he claims no more than they would be entitled to claim, if they had not sold their equitable interests; having sold, they become trustees of that equitable interest; their vendee acquires the same right which they had, that is, a right to call on the original vendors, indemnifying them against all costs and charges, for the use of their names to enable them to execute the sub-contract, by which they have undertaken to transfer their benefits under the primary contract. If I were to suffer this doctrine to be shaken by any reference to the law of champerty or maintenance, I should violate the established habits of this Court, which has always given to parties, entering into a sub-contract, the benefit which the vendors derived from the primary contract" (x). If the consideration for a conveyance is money, already advanced and to be advanced, for the purpose of supporting and carrying on suits for the recovery of the property conveyed, it is a case of clear and distinct maintenance, and a bill to enforce a title, founded on such a conveyance, was dismissed with costs by Lord Manners (y). In the case of *Hunter v. Daniel*, the point was raised. Sir James Wigram, V. C., said, "The first ground of demurrer is, that the agreement

(x) *Wood v. Griffith*, 1 Swan. 43.

(y) *Burke v. Greene*, 2 B. & B. 521. See cases collected in *Marquis Cholmondeley v. Lord Clinton*,

2 Jac. & Walk. pp. 26 and 56; and see Lord Eldon's remarks on the subject, 4 Bligh, 45.

amounts to champerty, or that it savours of champerty. The question is not, whether the agreement falls within some of the old definitions of champerty, but whether it amounts to champerty in the sense in which, at this day, champerty is forbidden by law. The plaintiff, the second mortgagee, has bought in the second mortgage pending the suit, and now openly institutes the suit, to have the benefit of the executing suit and of the proceedings therein, independently of those in whose place he stands. The question is, whether that is lawful or not. On referring to Hawkins' Pleas of the Crown (*z*), I find he has a section on acts of champerty, which he thus heads: 'How far they are justifiable in respect of an interest in the thing in variance.' Under this head, although an act of champerty, he says, it is not objectionable wherever there is an equitable interest in the title in dispute. He puts the case of an equitable interest in a dispute as to *choses* in action and of *cestui que trusts*; and he gives numerous instances of parties having a direct interest similar to that of the parties in this suit, and being yet allowed to maintain and defend the suit. The case of *Findon v. Parker* (*a*) appears to me to bring down to the present time the principle laid down by Hawkins, that a person having, or believing that he has, an interest in the subject in dispute, and *bonâ fide* acting in the suit—for it goes as far as this—may lawfully assist in the defence of that suit; I think, therefore, the case before me is not open to demurrer on the ground of champerty" (*b*).

(*z*) Vol. 1, p. 456, 8th ed.

(*a*) 11 M. & W. 675.

(*b*) 4 Hare, 431. See a discussion as to the validity of covenants

Agreements for contribution to the expense of suits, by parties not having an interest in them, would seem to fall within the mischief of maintenance, but they must not be treated too harshly; as Lord Eldon says, "If this is not permitted in many cases, the poor man will not get that to which he is entitled, and the rich man will withhold what he ought to have given up; and there may be such a combination, if the parties have a common interest in the subject" (c). But the Court will take care not to encourage such combinations to go too far. It might operate materially to impede the course of justice, if persons uniting in this manner against an individual could carry it beyond the immediate purpose, in which they are jointly interested (d).

Sir Thomas Plumer thought that an agreement for paying money, to prevent an opposition to a bill in Parliament, was a fraud upon the Legislature, and contrary to principles of public policy (e). Lord Eldon thought it was going a great way to say so (f), and Lord Cottenham held that an agreement with the projectors of a company, founded on a withdrawal of opposition to their bill, was good, and the Court would specifically enforce such an agreement against the incorporated company, they being affected by the equities affecting those to whose position they succeed (g).

entered into on a conveyance of lands, of which the grantor was not in possession. *Martyn v. McNamara*, 4 Dr. & W. 411.

(c) *Wild v. Hobson*, 2 V. & B. 112.

(d) *Stone v. Yea*, Jacob. 426;

Moore v. Usher, 7 Sim. 389.

(e) *Vauxhall Bridge Company v. Spencer*, 2 Madd. 356.

(f) *Vauxhall Bridge Company v. Spencer*, Jac. 64.

(g) *Edwards v. the Grand Junction Railway Company*, 1 M. & C.

Lord Tenterden thought that bargaining about an act of Parliament, to be obtained in future, was illegal (*h*), as void by the Common Law. In *Jackson v. Cocker* (*i*), which was a bill by a vendor of certain scrip certificates in a railway company, sold before the act for its incorporation had passed against the purchaser, to compel him to take a transfer of the shares corresponding to the scrip certificates: Lord Tenterden's opinion was mentioned. Lord Langdale said, that it was doubtful whether selling these shares was legal, and that he was by no means disposed to treat lightly the suggestions of Lord Tenterden; but it may be doubted whether the principle, upon which the legality of the transaction in *Simpson v. Lord Howden* was affirmed, would not extend to this. If one party agrees to purchase a contingent interest, even if that contingency is the obtaining an act of Parliament to create the interest, can he refuse to complete and take all the consequences of the transaction?

With respect to the Statute of Bracery, Lord Eldon, in *Cholmondeley v. Clinton* (*j*), said, "Courts of Equity, I believe, have always set their faces against giving any effect to contracts which came within the mischief which the policy of the statute was intended to guard against; and though the transaction may not be precisely and accurately hit by the statute, yet if it

670; *Simpson v. Lord Howden*, 3 M. & C. 97. See the case reported in the Exchequer Chamber, 2 P. & D. 731; 10 Ad. & E. 300. The decision in the House of Lords turned upon the pleadings, upon which the House held no fraud

was imputed. Lords Campbell and Brougham said, that there was in fact no fraud. 9 Cl. & Fin. 61.

(*h*) *Josephs v. Febrer*, 3 B. & C. 639.

(*i*) 4 Beavan, 63.

(*j*) 4 Bligh, 45.

comes within the mischief of the statute, the Court will not grant relief."

In *Uppington v. Bullen* (*k*), Sir E. Sugden, L. C. I., held, that a conveyance by a client to a solicitor in consideration of monies to be laid out in carrying on a suit could not stand, and amounted to an act of maintenance. Independent of this doctrine, a solicitor is not allowed to take a mortgage from his client to secure future costs. Lord Eldon said, "The Court would not permit an attorney to take from his client a mortgage for costs to be incurred; the inducement for the client to execute the deed was, that [the attorney] Tripp should proceed in his business for him; such a security cannot be allowed. The deed on the face of it is not supportable" (*l*). Sir James Wigram, V. C., in a recent case, said, "Another ground upon which the illegality of the contract has been argued is, that it is a contract by a solicitor with his clients for security for his costs; and that no solicitor can be allowed to contract for a security for his expenses, before these expenses have been incurred, whether professional or for costs out of pocket;" but his Honor did not decide that the rule went the length of prohibiting the solicitor from taking security for his advances (*m*). A solicitor is not allowed to retain a fund, and allow himself ten per cent. and his law charges out of it (*n*).

Agreements which tend to usury are not allowed to be enforced (*o*). A contract is usurious which re-

(*k*) 1 Conn. & Law. 295.

(*l*) Jacob, 322.

(*m*) *Parsons v. Spooner*, 10 Jur. 423.

(*n*) *Strange v. Brennan*, 15 L.

J. Rep., N. S., Eq. 38; see *Casborne v. Barsham*, 2 Beav. 76.

(*o*) *Belcher v. Vardon*, 2 Coll. 173.

serves the capital with legal interest, and likewise a contingent advantage, without putting capital or interest in any kind of risk (*p*). A lender of money cannot in any way stipulate for a greater benefit of any kind under whatsoever device or disguise, than the rate of interest allowed by law, all stipulations for collateral advantages are usurious; and all stipulations for a collateral matter, which might, by possibility, lead to a benefit, though not in themselves usurious, are yet illegal, as tending to usury (*q*).

Agreements in violation of the ship-registry acts, or for carrying on other dealings contrary to statute, confer no right (*r*).

Upon grounds of public policy, the Court refuses to carry out agreements in the case of certain joint stock trading companies. Lord Eldon thought that if the shares in such companies were not assignable and transferable to persons not original shareholders, the society was not illegal; but if there might be assignments and transfers of the shares, he understood that made it illegal (*s*). "But it is one thing," he added, "to say that the association is legal, and another to say that the Court is to lend its assistance in carrying it on." This doctrine was doubted by Lord Brougham in the case of *Walburn v. Ingilby*; that learned Judge held that a joint stock company, not incorporated by charter or act of Parliament, was not unlawful. In that case, there was a clause that no

(*p*) Per Sir W. Grant, *Barnard v. Young*, 17 Ves. 44; *Powney v. Blomberg*, 14 Sim. 182.

(*q*) See in *Leith v. Irvine*, 1 M. & K. 282-3, and cases there cited.

(*r*) *Battersby v. Smyth*, 3 Madd. 110; *Ewing v. Osbaldiston*, 2 M. & C. 81, and 3 M. & K. 45.

(*s*) *Ellison v. Bignold*, 2 J. & W. 510.

proprietor should be liable beyond the amount of his share, and it was urged that this was a fraud upon the world, and an attempt to evade the salutary principle upon which every partner is liable for the whole debts of the concern. Upon this point Lord Brougham said, "The clause intimating that each subscriber is only to be liable to the extent of his share, is not enough to make the association illegal; such a regulation is wholly nugatory, indeed, as between the company and strangers, and can serve no purpose whatever, unless to give notice. In that light it is not to be viewed as criminal, or as a means of deception; for the publicity of it may tend to inform such as deal with the company, and a proof of that publicity in the neighbourhood of parties so dealing might go to fix them with notice. For any other purpose, for the purpose of restricting the liability of the shareholders, it would plainly be of no avail; and whosoever became a subscriber upon the faith of the restricting clause, or of the limited responsibility which that holds out would have himself to blame, and be the victim of his ignorance of the known law of the land" (t). A different and a sounder doctrine seems to be the present rule; in the deed, the foundation of the bill in *Blundell v. Winsor*, there was a provision that the shares might be assigned or disposed of by deed or will to any person or persons, at the discretion of the holders. "The deed, therefore," said Sir Lancelot Shadwell, V. C., "necessarily represents that the persons who should assign their shares would get rid of all the

(t) 1 M. & K. 61.

liabilities attached to them, and that the persons who should take their shares would take them just as the assignors held them. It is clear, however, that this could not be done. In my opinion, therefore, the deed held out to the public as an inducement to them to become partners in this scheme, a false and fraudulent representation, that they might continue partners in the undertaking just as long as they pleased, and then get rid of all the liability that they had incurred, by transferring their shares to some other person. My notion is, that this deed is not only illegal, because it trenches on the prerogative of the King, by attempting to create a body not having the protection of the King's charter, the shares of which might be assigned without any controul or restriction whatsoever; but also because it held out to the public a false and fraudulent representation that the shares could be so assigned. The more such schemes are discouraged by Courts of Justice, the better it will be for his Majesty's subjects" (u).

The notion of these bodies being illegal, as trespassing upon the prerogative of the Crown, does not seem to be current now; if there is nothing fraudulent in the provisions respecting the assignment of shares (v).

In *Cousins v. Smith*, Lord Eldon allowed a demurrer to a bill filed against the select committee of what was called a fruit club. He said, "It was a case in which the Court ought not to assist the plaintiff. The transaction stated by the bill is a combination of the whole

(u) *Blundell v. Winsor*, 8 Sim. 601; see *Blain v. Agar*, 2 Sim. 289.

(v) *Wilson v. Stanhope*, V. C. K. B., 24th April, 1846.

body of grocers in London, the effect of which is, that all parties dealing in this article are compelled to purchase upon the terms dictated by the committee, having the means of buying up all the fruit imported from all parts of the world; and holding this language, that those who do not buy from them exclusively, shall not have any supply. This is not according to the legal definition of the term forestalling, much less regrating, still less monopolizing; but in the consideration of a Court of Equity, it contains the mischief of all three. The effect of this particular transaction is, that the defendants are to be partners with the plaintiff in purchasing two cargoes of fruit. What is that but an agreement that they shall be partners in a transaction in which they know they are acting illegally. I have known cases of illegal insurance, where, if upon the account before the Master, they appear to have been effected by a greater number of persons than is permitted by the act of Parliament (*w*) in favour of the chartered companies, those items were not allowed in the account, as the transaction, though right among the parties, was wrong with reference to the public" (*x*).

The Court will give no relief to contracts which are founded upon agreements entered into with persons assuming to be the government of a foreign country, but which have not been recognised as such by the government of this country (*y*). "What right have I," said Lord Eldon, "as the King's Judge, to interfere upon the subject of a contract with a country which

(*w*) 6 Geo. 1, c. 18, s. 12.
(*x*) 13 Ves. 546.

(*y*) *Jones v. Garcia del Rio*, T.
& R. 297.

he does not recognise?" (z) "It appears to me," said Sir L. Shadwell, "that sound policy requires that the Courts of the King should act in unison with the government of the King" (a). The principles of international law are to regulate the decisions of Courts of Justice, most particularly a Court of Equity is not to afford its extraordinary assistance to any transaction offending against the rules of international policy.

We may remark that, according to correct principles of international law, contracts, if made in a foreign country, ought to have no greater force here than they would have in that country; this doctrine has been established. The case of *Talleyrand v. Boulanger* was this: the Count de Perigord, as surety for his brother, the celebrated Talleyrand, had entered into an obligation to pay a sum of money, under which obligation, by the law of France, the person could not be arrested, either upon mesne process or in execution: the Count, on being arrested in England, gave the defendant a bill, which, being unpaid, he was again arrested, but the Lord Chancellor restrained proceedings in the action, saying, "it would be contrary to all the principles which guide the Courts of one country in deciding upon contracts made in another to give a greater effect to the contract than it would have by the laws of the country where it took place" (b). In *Heriz v. Riera*, the Vice Chancellor allowed a plea to a bill for enforcing an agreement made in Spain, that it was contrary to the law of Spain, and that the entering into it was

(z) P. 299.

(b) *Talleyrand v. Boulanger*, 3(a) *Thompson v. Powles*, 2 Sim. 194.

Ves. 449.

a course against the laws of Spain, subjecting the parties to pains and penalties (c). A contract entered into with an alien enemy is void (d), but if the two nations are at peace the contract is good, and the effect of war is only to suspend the effect of the contract; on the restoration of peace, the rights of the foreigner under the contract made in time of peace revive (e).

The Courts shew great regard for the policy of the ecclesiastical constitution of the country, and will not assist agreements made in contravention of its rules. In the case of *Lord Kircudbright v. Lady Kircudbright*, where there was a bond by Lord Kircudbright to secure an annuity to his son, until he should be in possession of a living of a certain value; and an agreement of the same date, reciting the bond, declaring, that the son would forthwith enter into holy orders and accept such living. The Lord Chancellor expressed great doubt as to the validity of the bond, observing, that it was void on many accounts. It is a corrupt agreement for taking holy orders; such as the Court ought to decree to be delivered up. The policy of the ecclesiastical constitution of this country requires, that a man should take orders without any reference whatsoever to considerations of this nature. There is no objection to the bond itself, except as connected with this agreement at the same time, for a pecuniary consideration to take holy orders. Another objection to this bond is, that the father is put under these circumstances that he is to solicit the benefit of patronage for

(c) 11 Sim. 319.

(d) *Evans v. Richardson*, 3 Mer.
470.

(e) *Ex parte Lee*, 13 Ves. 64;
ex parte Boussemaker, 13 Ves. 71.

this pecuniary consideration, moving from himself; the policy of the law, supposing the patron to look out for persons, the best that can be recommended to him, which excludes pecuniary consideration (*f*). It seems, from the language of Lord Eldon, C., in *Dashwood v. Peyton*, that (*g*) the Court would not give any assistance to an agreement involving a general bond of resignation, though, after the decisions of the Court of King's Bench in favour of particular bonds of resignation, and the statute expressly declaring the legality of such bonds, an agreement respecting a resignation in favour of a particular person would be enforced (*h*).

The refusal to sanction any agreement, founded on a violation of the policy of justice runs through the whole range of cases of specific performance. It is a direct answer to a bill seeking to enforce a contract, that the contract, either in its object or the consideration for it, or in the circumstances under which it was entered into, violates the rules laid down by public policy. This is well illustrated by the observations of Lord Eldon in *Cooth v. Jackson*. The defendant had entered into an agreement for a compromise, on account of three of the commissioners appointed to take evidence in the suit having recommended it. The defendant resisted the performance of this agreement, he insisted that he acted in the treaty, under a persuasion generated in his mind by the conduct of the commissioners; that in fact the contract was generated out of a gross breach of the duty of the commissioners. "Then," said his Lordship, "the question is, whether

(*f*) 8 Ves. 53.

(*g*) *Dashwood v. Peyton*, 18

Ves. 27.

(*h*) 9 Geo. 4, c. 94.

the policy of justice will permit the plaintiff to come here, saying the evidence satisfied the Court that the defendant entered into the contract in consequence of communications which the policy of the law will not permit, which are a breach of the duty of the commissioners, and desiring me to give him a pecuniary advantage arising from such a contract. As to the fact I have no doubt that the defendant entered into the contract under what I may state as a species of duress, with a full conviction that these commissioners stating the distinction to him between persuasion and force meant to tell him, persuasion was force, and if he did not take the proposition immediately, he would get nothing. How can it be consistent with the security of the administration of justice, that the Court can act upon that if it is the fact. There is no reason upon the evidence to say the representation is false. The Court, in the nature of things, has no evidence that it is true, for it depends upon the substance of that evidence not yet disclosed to the Court. Supposing it false, how is it possible for the Court to grant a specific performance of an agreement founded upon such a transaction? Can, I say, even if true, it can be founded on such a fact?" (i).

Agreements for composition with creditors require the greatest good faith; if such good faith be not observed, the transaction is void at law (j). A creditor cannot ostensibly accept such composition, and

(i) *Cooth v. Jackson*, 6 Ves. 36.

(j) *Howden v. Haigh*, 3 Perry & Dav. 661; *Knight v. Hunt*, 5

Bing. 482; *Pendlebury v. Walter*, 4 Y. & C. 424; *Cullingworth v. Loyd*, 2 Beav. 385.

sign the deed which expresses his acceptance of the terms, and at the same time stipulate for and secure to himself a peculiar and separate advantage, which is not expressed upon the deed; and this rule applies to a security from any other person as well as from the debtor himself. But, if the security be known to all the parties to the composition deed, and expressed in the deed, there being no fraud or concealment, it will stand (*k*).

Contracts, in restraint of trade generally, are invalid at law. Any deed, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void (*l*).

Contracts between two persons, to restrain one of them from setting up or exercising a particular trade or employment, within a certain limited district, and for a valuable consideration, are valid at law, and will be enforced by a Court of Equity (*m*). But the Court has been tender of giving its assistance to contracts for the sale of the goodwill of a profession. In the case of *Bunn v. Guy*, the Lord Chancellor directed the case to be sent to law, for the purpose of ascertaining the legality of the provisions respecting the goodwill of a profession, and Sir Wm. Grant said, "Though it was ultimately determined that they were not illegal, I think that he would hardly have decreed them to be specifically executed" (*n*). In

(*k*) *Mawson v. Stock*, 6 Ves. 300; *ex parte Sadler and Jackson*, 15 Ves. 52; *Lee v. Lockhart*, 3 M. & C. 302.

(*l*) *Per Best, C. J. Homer v.*

Ashford, 3 Bing. 328.

(*m*) *Gale v. Reed*, 8 East, 86; *Young v. Timmins*, 1 C. & J. 331; *Horner v. Graves*, 7 Bingh. 743.

(*n*) 4 East, 190; 1 Mer. 473.

Bozon v. Farlow, Sir Wm. Grant himself doubted the propriety of assisting a contract to sell an attorney's business, from its being a kind of breach of confidence on the part of the attorney, and against public policy (*o*). These doubts have been frequently entertained by other Judges, but the practice of sanctioning such agreements has gone too far to be now questioned (*p*).

On this point we may remark, that the provisions of 22 Geo. 2, c. 46, s. 11, have met with a very lenient construction in Courts of Equity: the act is repealed by 6 & 7 Vict. c. 73; but in that act is a similar clause. In *Tench v. Roberts* (*q*), Roberts, an attorney, had agreed with Tench, his clerk, that the latter should take a third of the profits as salary. To a bill against Roberts, for an account, Sir John Leach, V.C., allowed a demurrer, saying, that this was, in effect, a partnership by an attorney with an unqualified person. In *Candler v. Candler* (*r*), however, the same Judge, by granting a receiver, gave effect to an agreement, by which an attorney undertook to pay a share of the profits of his business to his mother and sisters. He distinguished the cases: he said, "the obvious meaning of the statute was that a qualified person should not permit an unqualified person to act or practise in his name." His construction of the statute was supported by the recital that preceded the clause; (that recital has been omitted in the new act). The judgment of Sir John Leach was affirmed by

(*o*) 1 Mer. 473.

(*p*) *Whittaker v. Howe*, 3 Beav.
393.

(*q*) 6 Madd. 141.

(*r*) 6 Madd. 141.

Lord Eldon, who said, "I think that, looking at the recital, such a transaction is not within the meaning of the legislature" (*s*).

It is a question of considerable importance, whether a person can bar himself of a right to sue in a Court of Justice by agreement. It was said (*t*), that agreement of parties cannot prevent a Court of Equity of its jurisdiction; as, in case of a mortgage, it cannot be agreed that this Court shall not give relief (*u*).

In *Auth v. Sanborne*, the plaintiff had agreed, upon a trial being put off, not to file a bill in Equity for an injunction. The Master of the Rolls said, the Court would not suffer the plaintiff, after such an agreement, to come for an injunction (*v*). So in *Buck v. Fawcett* (*w*), where the parties agreed to be bound by the decree and not to bring an appeal, although after an order had been made for a re-hearing, the Lord Chancellor refused to discharge it; yet he said, that had the agreement been disclosed to the Court, he did not think the order would have been made; and that there were cases where the Court would not allow the party to avail himself of the rules of the Court after he had agreed not to do so. And the Court will also interfere to restrain applications to other Courts which the parties have agreed shall not be made; the Court has restrained proceedings in the Ecclesiastical Court to set aside a will after agreement not to take them (*x*). So the

(*s*) Jac. 225.

(*t*) See the argument, Ch. Ca. 141.

(*u*) It is said, a man may restrain his power of redemption within certain limits. *Talbot v. Braddyl*, 1 Vern. 395; *Skeeles v. Shearly*, 3 M. & C. 121. But if these limits

are unreasonable, may not the Court direct a redemption?

(*v*) 4 B. C. C. 497.

(*w*) 3 P. W. 242.

(*x*) *Gascoyne v. Chandler*, 3 Sw. 418, (*n*); see *Sheffield v. the Duchess of Buckinghamshire*, 1 Atk. 628.

Court may restrain proceedings in the Ecclesiastical Court for the restitution of conjugal rights (*y*). So, in *Norton v. Wood* (*z*), where there was an undertaking not to call in money while the interest was regularly paid, the Court restrained proceedings at law to recover the money. It may be observed that the undertaking was contained in a letter, to the effect if the interest be regularly paid it is not my intention to call in the money for four years from this day: this was held sufficient and binding (*a*).

The question arises generally upon agreements in partnership deeds, that disputes shall be determined by arbitration, and it is not quite clear whether an agreement, in addition to that appointing this kind of forum, that no suit shall be instituted in law or equity respecting the matter, can be enforced.

A plea of an agreement to refer to arbitration will not be allowed in bar to a bill: this was first decided by *Wellington v. Mackintosh* (*b*); although the reasons attributed to Lord Hardwicke by the reporter can hardly be supposed to have been those actually given by that great Judge. In *Mitchell v. Harris* (*c*) Lord Rosslyn held that a mere agreement to refer could not take away the jurisdiction, and in *Street v. Rigby* (*d*), Lord Eldon, in laying down the same rule, appears to have rested it on the refusal of a Court of Equity to entertain a bill for the specific performance of an agreement to refer and to name arbitrators (*e*); and,

(*y*) See *Earl Westmeath v. Countess of Westmeath*, Jac. 126; see p. 140.

(*z*) 1 R. & M. 169.

(*a*) See *Earl Uxbridge v. Bayly*, 1 Ves. jun. 499.

(*b*) 2 Atk. 569.

(*c*) 4 Bro. C. C. 311; 2 Ves. jun. 129.

(*d*) 6 Ves. 815.

(*e*) See *Price v. Williams*, 1 Ves. jun. 365.

in *Waters v. Taylor* (*f*), his Lordship said, "As a general proposition, therefore it is true, that an agreement to refer disputes to arbitration, will not bind the parties even to submit to arbitration, before they come into Court."

It appears that, under the old practice, on a submission to award being made a rule of the Court of Law, it was always a part of the rule, that the parties shall bring no bill in equity either against the arbitrators or each other (*g*), and this rule the Court of Law enforces, in its discretion, by attachment against the parties proceeding in equity; but it still remains to be seen, whether an agreement not to sue in law or equity ousts the jurisdiction.

In *Halfhide v. Fenning* (*h*), the articles were, that if any controversy should arise between the parties, they should be referred to arbitration, and that there should not be any suit at law or in equity. Lord Kenyon, in allowing the plea indeed rested his decision upon the agreement to refer to arbitration; an opinion which has been repeatedly disapproved of; but the decision, on account of the negative words, has never been directly impeached.

In *Mitchell v. Harris* Lord Rosslyn remarked upon *Halfhide v. Fenning*, "that in that case there was an express agreement, that there should be no suit at law or in equity. Parties may so agree; and it is every day's practice, that if they do, they cannot proceed contrary to the agreement. In that case the covenant would be a bar."

(*f*) 15 Ves. 10.

(*g*) Lord Lonsdale *v.* Littledale,

2 Ves. jun. 451.

(*h*) 2 Bro. C. C. 336.

In *Kill v. Hollister* (*i*) the Judges of the Common Pleas held, that a covenant to forbear suit was futile; as to which Lord Eldon remarked, in *Street v. Rigby* (*j*), "*Kill v. Hollister* however shews that Courts of Law are ready enough to say, the agreement of the parties shall not oust their jurisdiction; though they permit it to oust the jurisdiction of Courts of Equity. But they enforce the agreement, not as agreements, but by granting an attachment for breach of the rule. It is dealing a little imperiously to say, that an agreement, which made out of Court, would not bar an action; if made in Court, shall bar a bill." His Lordship afterwards said there would be considerable difficulty as to a negative covenant, that they will not sue, and afterwards, that he did not enter into the question of the effect at law of a covenant not to sue. In *Nichols v. Chalie* (*k*) he remarked, "It does not appear even, that there was the term imposed upon the party not to file a bill in equity, the effect of which has never been determined in a Court of Equity."

Again, in *Waters v. Taylor* (*l*), the arbitration clause directed that the award should be observed and kept by the parties, *without any suit whatsoever*. Upon a bill filed, the case being a partnership in a theatre, Lord Eldon refused the motion for a receiver: he alluded to the peculiar evil of deciding such a question upon an interlocutory motion, and said, "My argument is, that the forum the parties have provided for themselves, and the guard introduced by them against the

(*i*) 1 Wils. 129.

(*j*) 6 Ves. 815.

(*k*) 14 Ves. 265.

(*l*) 15 Ves. 10.

forum of the country (whether effectually, I do not say) shews their intention against the interference of any other jurisdiction, until they have tried the effect of the special jurisdiction provided by themselves." The question however remained unsettled. Sir Wm. Grant, in *Gourlay v. the Duke of Somerset*, considered *Waters v. Taylor* as depending upon the peculiar circumstances, saying, "In some cases, under particular circumstances, as in *Waters v. Taylor*, relative to the Opera House, and the case of a brewery, where there were many partners, the Court has said, it will leave the parties to the remedy they have chalked out for themselves; but then it refused all interposition" (*l*).

In the *Earl of Mexborough v. Bower*, Lord Langdale, M. R., said, "It has been decided that these clauses for a reference are not binding upon the parties who cannot contract themselves out of their right to have their disputes settled in Courts of Justice" (*m*).

A different doctrine has however been maintained and carried out in decision by the late Lord Chancellor of Ireland. In *Dimsdale v. Robertson* (*n*), before him, the plaintiff contended that a reference to arbitration cannot be used as a defence to a suit, and relied upon the case of *Street v. Rigby*, which we have already mentioned. The judgment of Sir Edward Sugden is of so much importance, and states so fully the law upon the point, that we give it at length.

"It is no doubt clearly settled, as Lord Kenyon said in *Thompson v. Charnock* (*o*), that an agreement to refer to arbitration is not sufficient to oust the Courts

(*l*) 19 Ves. 431.
(*m*) 7 Beav. 132.

(*n*) 2 Jones & Lat. 58; see p. 90.
(*o*) 8 T. R. 140.

of Law or Equity of their jurisdiction, Lord Hardwicke so determined in *Wellington v. Mackintosh* (*p*), yet he said he would not have it understood that such an agreement might not be made and pleaded, but there should be a power to examine witnesses on oath; upon which it was observed by Lord Kenyon and by Lord Eldon, that the parties could not confer such a power. Now, in the present case, there is not only an agreement to refer, but arbitrators were actually named, and there is an express covenant not to sue, and an agreement to make the submission a rule of the Court of Queen's Bench of either England or Ireland, and the 3 & 4 Wm. 4, c. 42, England, and 3 & 4 Vict. c. 105, Ireland, take away the right to revoke the submission, without the leave of the Court, when the arbitrators are appointed by, or in pursuance of, any submission to a reference containing an agreement that such submission shall be made a rule of Court, and give power to compel the attendance of witnesses, and empower the arbitrators to administer an oath, where as in this case it is agreed, that the witnesses shall be examined upon oath. These powers place such arbitrators on a different footing, and remove one great objection made to them by both Lord Hardwicke and Lord Eldon. In *Halfhide v. Fenning* (*q*), where the agreement was to refer to arbitration, and that there should not be any suit at law or in equity, Lord Kenyon allowed a plea to a bill before a reference. He held that arbitration should be first resorted to, and if the arbitrators could not determine it, the

(*p*) 2 Atk. 569.

(*q*) 2 Bro. C. C. 336.

jurisdiction would be restored. It is said, that this decision has been overruled, even by Lord Kenyon himself. I think that the reasons for the decision are satisfactory as applied to the actual case before Lord Kenyon, and I am prepared to act upon them, unless the case has been overruled in *Mitchell v. Harris* (r), where the agreement was simply to refer, and the bill was filed for a discovery in aid of an action. Lord Rosslyn supported the bill, but in the course of the argument he distinguished the case before him from that of *Halfhide v. Fenning*. In that case he said, there was an express agreement that there should be no suit at law or in equity. Parties may so agree, and it is every day's practice, that if they do, they cannot proceed contrary to the agreement; in that case the covenant would be a bar; here, he said, the only effect of it would be to give damages, but it could not be pleaded in bar of the action. In giving judgment, however, he wholly lost sight of this distinction, and therefore thought *Halfhide v. Fenning* contrary to the case in *Atkins*, and quite inconsistent with the resolution of the Court of King's Bench in *Wilson*, neither of which appears to me to clash with it. The report in *Mitchell v. Harris* in Brown merely makes him say, that it was unnecessary to discuss the case of *Halfhide v. Fenning*. In *Tattersall v. Groote* (s), Lord Eldon, noticing the distinction in *Halfhide v. Fenning*, thought he did not misconstrue the case of *Mitchell v. Harris*, by stating that the opinion of Lord Loughborough did not agree with the doctrine laid down in that case.

(r) 2 Ves. jun. 129; 4 B. C. C.
311.

(s) 2 Bos. & Pull. 131, 136.

In *Street v. Rigby* (*t*) he again seemed to doubt the authority of *Halfhide v. Fenning*, yet thought there would be considerable difficulty upon a negative covenant not to sue, which was the case before Lord Kenyon, and he held, that a covenant to refer does not amount to an agreement to forbear to sue. In *Waters v. Taylor* (*u*), Lord Eldon considered the opinion, expressed by Lord Kenyon, wrong, as there were against it the concurrent opinions of Lord Hardwicke, Lord Thurlow, Lord Rosslyn, and Lord Kenyon himself, 'as a general proposition,' therefore he added, 'it is true that an agreement to refer disputes to arbitration will not bind the parties even to submit to arbitration before they came into Court; but this is a point which Lord Kenyon did not decide, and I confine myself to the very point decided by him'. I am not aware of any case in which Lord Kenyon doubted his own decision. Probably, what fell from him in the case in the Term Reports may have been so considered, although it is confined to a simple covenant to refer. There is no report of any decision of Lord Thurlow's impeaching Lord Kenyon's. Upon the whole, therefore, I think that *Halfhide v. Fenning* is still law, and the objections to it have probably been occasioned by Lord Kenyon's general observations. At all events, I think that an agreement to refer, and arbitrators named, and a covenant not to sue, and a power to make the submission a rule of Court, particularly having regard to the legislative provisions in such a case, do prevent a party from filing a bill with a view,

(*t*) 6 Ves. 820.

(*u*) 15 Ves. 10.

as in this case, to withdraw the case from the arbitrators. It does not appear to me, that because a bill cannot be filed to have arbitrators named, or to supply the place of an award, it follows that a bill can be filed before an award in direct opposition to the plaintiff's own covenants. In this case, like that of *Waters v. Taylor (v)*, the parties have anxiously provided for the reference to arbitration of the several matters in respect to which any difficulty was likely to arise, and indeed this case goes much further. Lord Eldon there, upon an interlocutory application, drove the parties to a reference. Sir William Grant afterwards observed, in *Gourlay v. Duke of Somerset (w)*, that in some cases under particular circumstances, as in *Waters v. Taylor*, the Court has said it will leave the parties to the remedy which they have chalked out for themselves, but then it refused all interposition. He in that case substituted the Master for a referee named, as the plaintiff filed his bill for relief, and he could not in that particular have it, except through the machinery of the Court, and the defendant did not raise the objection. The case of *Morse v. Merest*, before Sir John Leach, went further. The parties had agreed for the sale of an estate by one to the other for twenty-five years' purchase, on an annual value to be set by three persons named before a certain day; the seller had prevented the valuation from being made by the day named; the purchaser filed his bill. The Vice Chancellor held, first, that the seller had, by his own conduct, opened the time; secondly, that, al-

(v) 15 Ves. 10.

(w) 19 Ves. 431.

though an agreement to sell at a price, to be named by A., could not be enforced at any other price, yet it appearing that the defendant refused to permit the referees to come upon the land, the Court had jurisdiction to remove that impediment, and could decree that the defendant should permit the valuation to be made according to the contract, and if it were so made, then a supplemental bill might be filed for a specific performance upon the terms of their valuation: the Court therefore gave its assistance to the referees, to enable them to make the valuation upon which the right to a specific performance depended. I may observe, that *Waters v. Taylor* was ultimately disposed of in a way which does not affect the question before me."

It was formerly considered that the Court would, in the case of a positive agreement, restrain an individual or a corporation from applying to Parliament for a private bill (*x*), and, in *Frederick v. Coxwell* (*y*), there was a covenant to prefer a petition for, and use the utmost endeavours of the covenantors to obtain, a private act of Parliament. The Lord Chief Baron said, the covenant is not to procure an act, but only to petition, and he decreed that the defendants (the covenantors) should permit their names to be used in an application to Parliament; and this decision seems to involve the converse case, that the Court would have enforced an agreement not to petition the Legislature for a private bill. But Lord Cottenham, in *Attorney General v. the Manchester and Leeds Rail-*

(*x*) *Mayor, &c. of King's Lynn v. Pemberton*, 1 Sw. 244; *Ware v. Grand Junction Water Company*, 2 Russ. & M. 479.
(*y*) 3 Y. & J. 514.

way Company (z), seems to doubt the jurisdiction. His Lordship said, "Whether I could have interfered before the party had applied to Parliament is a matter that I do not go into. It will require great consideration before this Court will interfere to prevent people from petitioning the Houses of Parliament. That is the first proceeding; but when they have petitioned, and either House has entertained the bill, it becomes the act of the House and not the act of the party. No case has been cited to me which would shew that I have that power without reference to property; the cases where the Court has interfered to prevent the application of funds are a different matter; they are collateral to the question. No case has been cited in which this Court has interfered to restrain parties from petitioning Parliament, or applying to Parliament for any law which they supposed would be granted, unless a very strong authority is produced for that purpose, I should be disinclined to assume that jurisdiction."

It is of course against the policy of a Court, which interferes merely for the purpose of enforcing the performance of trusts, to aid any person in obtaining the performance of an agreement, which, if executed, would be a breach of the trust reposed in the other party. Accordingly, trustees for sale of a property can only compel the specific performance of a contract which it is proper for them to have entered into, and the House of Lords have decided that a bill to enforce a contract for sale by trustees, on the contract being proved to be improper must be dismissed (a).

(z) 1 Railway Cases, 458.

(a) White v. Cuddon, 8 Cl. &

Fin. 766; Bridges v. Rice, 1 J. & W. 84.

Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best prices, and that in the execution of their trust, they will pay equal and fair attention to the interest of all persons concerned. If trustees, or those who act by their authority, fail in reasonable diligence, if they contract under circumstances of haste and improvidence, if they make the sale with a view to advance the particular purpose of one party interested in the execution of the trust at the expense of another party, a Court of Equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been. The remedy of the law is open to such a purchaser, but he has no claim to the assistance of a Court of Equity (*b*).

Lord Eldon, in one case (*c*), grounded his refusal to enforce the contract against the trustees, upon the fact that the purchasers knew them to be trustees; that would be the trustees' defence at law, but in equity their proper contracts only will be enforced (*d*). When trustees of sale submit to act under the direction of the Court, it is a matter of course to direct a reference as to the propriety of the contract (*e*).

Contracts with trustees for a charity are peculiarly regarded with jealousy. It seems that a sale or long lease of a charity estate will be set aside by the Court, unless proved to be for the benefit of the charity (*f*).

(*b*) *Ord v. Noel*, 5 Madd. 440. See *Hill v. Buckley*, 17 Ves. 394; *Wood v. Richardson*, 4 B. 177.

(*c*) *Turner v. Harvey*, Jacob, 178.

(*d*) *Evans v. Jackson*, 8 Sim. 217; *Sugden on Powers*, vol. 2, p. 511.

(*e*) *Doran v. Wiltshire*, 3 Madd. 699, cf. *Attorney General v.*

Launderfield, 3 Sw. 416 (*n*). *Attorney General v. Kerr*, 2 Beav. 430.

(*f*) *Attorney General v. Brooke*, 18 Ves. 320; *Attorney General v. Buller*, Jac. 407; *Attorney General v. Hungerford*, 2 Cl. & Fin. 374; *Attorney General v. Burgesses of Newark-upon-Trent*, 1 Hare, 395.

All agreements for the purchase of property made by trustees, or other persons, who by being employed or concerned in the affairs of the owner have acquired a knowledge of the property, are invalid, and will not be enforced, unless the relation is plainly at an end. Lord Rosslyn is said to have thought that this was only when the trustee had made an advantage(*g*); but Lord Eldon said, "Whether he makes advantage or not, if the connection does not satisfactorily appear to have been dissolved, it is in the choice of the *cestui que trust*, whether they will take back the property or not, if the trustee has made no advantage; that it was founded upon this, that though you may see in a particular case that he has not made advantage, it is utterly impossible to examine, upon satisfactory evidence, whether he has made advantage or not; that, suppose a trustee bought an estate, and by the knowledge acquired in that character discovered a valuable coal mine under it, and locking it up in his own breast, entered into a contract with his *cestui que trust*; if he chose to deny it, how could the Court try it against that denial?" (*h*). It is a general principle, that a man cannot be a seller of property for another and a buyer for himself (*i*).

A covenant against alienation is void at law by a person seised in fee: and so much is this the rule at law, that a covenant not to assign without license, being a condition against alienation, is gone by a license once granted (*j*), although that license be only to a particular person (*k*). Lord Eldon said, that he should

(*g*) 6 Ves. 627.

(*h*) *Ex parte Lacey*, 6 Ves. 625.

(*i*) *Rothschild v. Brookman*, 5 Bligh, N. R. 199.

(*j*) *Dumpor's case*, 4 Co. 119;

Jones v. Jones, 12 Ves. 191.

(*k*) *Brummell v. Macpherson*, 14 Ves. 173; *Blacker v. Matthews*, 5 B. P. C. 340.

not have thought that a good decision originally; and he would not extend it to a license to carry on one trade after a restriction against carrying on particular trades without license. He said, "I think here we ought to hesitate to say, that, if the license is to be in writing, a mere act, not establishing whether the party meant a license, general or particular, should be taken to be a general license: admitting therefore the application of the doctrine of law in the case [of assignment]. If, however, the covenant is not to convert the premises into a shop, or to carry on a trade without a license in writing, I cannot conceive, that the permission of the lessor, without writing, to carry on one trade amounts to a general license for any trade; as the good sense is, and, if it is new, the law ought to be, that you must infer from his conduct, that the lessor would have given in writing that sort of license which it would have been prudent to give; and it cannot be represented, that a license to open a shop for a particular trade raises the inference, that, commencing with that trade, the lessee may afterwards carry on any other" (*l*).

In *Collins v. Plummer* (*m*), it was decided that a condition annexed to an estate-tail, that the tenant should not alienate, was void, and that a covenant to the same effect by tenant in tail, though entered into for valuable consideration was void: it being an essential property

(*l*) *Macher v. the Foundling Hospital*, 1 V. & B. 188. "If I do let a tenement to J. S. near by my dwelling-house in a borough, provided that he shall not erect or use any shop in the same without my license, and afterwards I license

him to erect a shop, and J. S. is then a miller; he shall not, by virtue of these general words, erect a joiner's shop." Lord Bacon's *Maxims of the Law*, Reg. 10.

(*m*) 1 P. W. 104.

of estates-tail, that they should be capable of alienation (n). But the estate given may only endure until alienation, and if that be distinctly provided for, it will be allowed in a Court of Equity.

A difficulty however arises as to alienations by operation of law, and as to whether these are included in such provisos or conditions. In *Seers v. Hind*, Lord Thurlow said, "If A. lets a farm to B., with a covenant not to alien, and B. dies, may not his executors dispose of it? I think it has been determined that they may, and I have always taken it as clear law. It is an alienation by the act of God. I remember Lord Camden entered into the question much in the same way. He took it to be clear that an alienation by death could not be a forfeiture. In case of a lease for years to A., it goes to his executor not by way of limitation, as in the case of a remainder over, &c., but it goes to him as coming in the place of the lessee" (o). In *Phillips v. Everard*, there was an agreement entered into by a man to take a lease, subject to a covenant not to assign without notice. After his death, the lessor filed a bill for specific performance against the executor; he had previously offered to permit the covenants on the part of the defendants to be as far qualified, as if they had been entered into by their testator. It was objected that no lease could be granted to executors, subject to a covenant not to assign, but Sir L. Shadwell, V. C.,

(n) *Legard v. Hodges*, 1 Ves. jun. 478.

(o) 1 Ves. jun. 294. If the covenant is, that the lessee, his executors

or administrators, shall not assign; they cannot assign. *Doe d. Gregson v. Harrison*, 2 T. R. 429.

directed the contract to be specifically performed, and referred it to the Master to settle the lease (*p*).

A question has also been made as to restraints against alienation by the operation of the Bankrupt or Insolvent Acts, by a proviso limiting over the property in the event of bankruptcy or insolvency. In *Ex parte* Cooke, Lord Eldon said, "You may limit the property of the wife to the husband, until he becomes bankrupt, and from that event to her separate use, and to the children afterwards, that property in which he might have had, if not a bankrupt, either a partial interest with her or a separate interest" (*q*).

Again, Lord Eldon, in *Brandon v. Robinson*, said, "There is no doubt that property may be given to a man, until he shall become bankrupt. It is equally clear, generally speaking, that if property be given to a man for his life, the donor cannot take away the incidents to a life estate; and, as I have observed, a disposition to a man until he shall become bankrupt; and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited" (*r*).

But an owner of property cannot settle it upon himself, even for a valuable consideration, so as to shift it either upon bankruptcy or insolvency, or on his attempting to assign it. That this should be the case when there is no contract for valuable consideration is of course.

(*p*) 5 Sim. 102.

(*q*) 8 Ves. 356.

(*r*) 18 Ves. 429.

That third parties, as the wife or her family, cannot purchase this agreement with respect to the husband's property and yet can effectually settle their own in this manner seems strange; but the authorities are clear.

The judgment of Lord Eldon, C., affirming the decision of Sir William Grant, M. R., decides the point. It is the case of *Higinbotham v. Holme*, "The facts upon which this decree has been pronounced at the Rolls, are, that the husband of the petitioner at the time of their marriage was not indebted; and had no formed purpose of entering into trade; but having been intended for the Church, he changed his purpose; entered into trade, and became a bankrupt; and the question is, whether a provision of this sort [that the estate shall go over to the wife and children], can be sustained against creditors. This settlement looks forward to a change of intention, to the purpose of becoming a trader; and looks forward expressly to the possible consequences of that purpose, and so looking forward to such change of purpose and to such consequences, it is a limitation by the effect of which the estate would go to the creditors: that change being adopted with the express object of taking the case out of reach of the bankrupt laws; and as to the consideration from the covenant of the father, which, though it may prove perhaps worth little or nothing, is to be regarded as a consideration with reference to all the provisions of the settlement, though undoubtedly an annuity might have been provided by the settlement for the wife on all events, yet it is not competent to a party, giving a consideration for a contract, that is a direct fraud upon the bankrupt laws, to have the benefit of

it. I cannot assimilate this to the case of the wife's property limited until the bankruptcy of her husband; that is, where she reserves a power over her own property; or to the case of a lease made determinable by the bankruptcy of the lessees, that is a reservation by the owner of the property of a power over it" (s).

Again, in *Wilson v. Greenwood*, there was a condition that upon the dissolution of the partnership, in certain specified modes affecting one partner only, the other partner should be entitled to take his share, at a sum fixed by valuation and payable by instalments. This did not extend to the case of bankruptcy, but by a subsequent deed, it was made to do so. Lord Eldon held, that this subsequent deed was made in contemplation of bankruptcy: but as to the question whether supposing the original deed had provided in this manner, if the partnership should be dissolved by bankruptcy, it being urged that a man could not by contract control the disposition of his property in the event of his bankruptcy: Lord Eldon said, "I will not say that such a provision would not be good; but I have heard nothing to convince me that it would" (t).

In *Phipps v. Lord Ennismore*, upon marriage, the husband tenant for life, covenanted not to sell or incumber his estates, and it was declared that if he should at any time sell or incumber them, or attempt so to do, the trustees should receive the rents and profits, and apply them as they might think fit, for the maintenance and support of the husband, or his wife or children, or issue. The husband incumbered his estates, the trustees applied some of the rents and

profits to the maintenance of himself and children: the Vice Chancellor [Sir John Leach], ordered the Master to disallow such payments, whether for the benefit of the husband or the children. On appeal, Lord Lyndhurst affirmed the decision of the Vice Chancellor. His Lordship said, "The only question which admits of doubt, is, whether the provision can be sustained against the incumbrancer, so far as regards the application of the rents and profits to the maintenance of the wife and children? It was admitted on all hands, that the parties to the deed did not contemplate a fraud; but the transaction is, in its very nature fraudulent. Though the parties had no fraud in view, the deeds themselves are fraudulent. If the tenant for life procured any person to advance money to him on the security of the property, in that event, and on that event only, was the instrument in question to have operation. In point of law, the deed cannot be sustained. I concur therefore with the judgment of the Vice Chancellor" (u).

In equity married women are entitled to peculiar privileges, among which is the power of contracting that their property shall be incapable of alienation during the coverture. The question what constitutes an effectual clause against anticipation in an ordinary settlement for the separate use of a wife, does not belong to this treatise, but the reader's attention should be called to the decision in *Hyde v. Price*; there upon an agreement for separation, the husband agreed to pay to a trustee for the support and maintenance of the wife, an annuity

of £100 by quarterly payments. Lord Alvanley, M. R. said, that the wife could not alienate the property so appropriated, and destined for her maintenance by her husband; he was of opinion that this was not property she was entitled to for her sole and separate use. There is a special trust upon it: she has no dominion over it, and her remedy for a misapplication is in this Court (*v*). No question, however, was made in a recent case as to the assignability of an allowance to the wife upon separation of £400 a year for maintenance (*w*).

There is no objection to the specific performance of articles of separation, arising out of the supposed illegality of the object, if they are entered into for a valuable consideration. The guarantee of a trustee against the debts of the wife, is considered to be a sufficiently valuable consideration. In *Wilson v. Wilson*, Sir L. Shadwell, V. C., said, it would be the most idle pedantry in the world to affect to have a doubt upon the question; because whatever might have been the original difficulty in coming to a conclusion, that Courts of Equity would specifically perform such agreements: it appeared to him that the matter is concluded by authority (*x*).

Adultery by the wife will not prevent the Court from performing articles of separation any more than ordinary marriage articles. This was decided by Sir William Grant in *Seagrave v. Seagrave* (*y*). He said,

(*v*) 3 Ves. 437.

(*w*) *Rochard v. Fulton*, 1 Jones & Latouche, 444.

(*x*) 14 Sim. 405, and cases there cited, to which may be added *Free-*

man v. More, 3 B. P. C. 378, the decision has been appealed from and argued in the House of Lords.

(*y*) 13 Ves. 439; *Buchanan v. Buchanan*, 1 B. & B. 203.

"It is said this Court will never interfere in favour of a woman who has committed adultery, to enforce any right against her husband. That is not so. This Court does interfere for the purpose of enforcing the performance of marriage articles, though the husband may have proved that his wife is living separate from him in a state of adultery. In the case of *Sidney v. Sidney* (z), the Lord Chancellor inclined to that opinion, though it was not necessary to determine the point. But in *Blount v. Winter* (a), in 1781, the Court did specifically decree the execution of marriage articles, making a provision for a woman whom her husband proved to be living separate from him in a state of adultery, the husband insisting upon that ground, that he was not bound to perform the articles."

But if there be an agreement before marriage for the payment, out of the husband's estate, of an annuity to the wife, in the event of any separation taking place between them, the Court will not specifically enforce it. Sir Lancelot Shadwell, V. C., said, "If the bad conduct of the wife *may be* the contingency in which the husband will be bound to make the provision, the contract must fail altogether, for it is an inducement to the wife to be guilty of the most atrocious conduct, in order to entitle herself to the provision" (b).

It is not against public policy to agree for a consideration not to apply to set aside a voidable marriage (c).

(z) 3 P. W. 269.

(a) 3 P. W. 276. Mr. Cox's
note.

(b) *Cocksedge v. Cocksedge*, 14

Sim. 244; but see S. C., 5 Hare, 397,
and 5 M. & C. 243.

(c) *Westby v. Westby*, 1 Conn.
& Law. 537.

The Court itself will notice any illegality in the transaction, although not insisted on by the defendant. In *Parken v. Whitby*, Sir Thomas Plumer said, "Suppose a bill were filed for the specific performance of a contract for the purchase of a cargo of spirits, and it were to appear in the course of the evidence, that the cargo was smuggled; the Court would not shut its eyes to a fact so presented to it, even though neither party had put the fact in issue" (*d*).

If an agreement is illegal, the Court will not only refuse specifically to perform it, but it will give no kind of relief, as for instance, an account, upon the footing of an illegal transaction. In *Ex parte Mather and Watts v. Brooks* (*e*), it was held that although, the transaction was so illegal that the Court could not execute the contract, yet where the result formed an item in an account, the Court would give effect to such result. "It is sufficient to say," said Lord Cottenham, "that this case has been disapproved of by Sir W. Grant, in *Knowles v. Haughton* (*f*), and overruled by that case; and it was clearly contrary to the prior case of *Mitchell v. Cockburn*" (*g*). It is therefore impossible that a plaintiff can be entitled to any decree which shall be founded upon or growing out of an illegal contract (*h*).

At law, if the consideration were illegal, the whole of the agreement is illegal, but if the consideration were good, and a portion only of what is agreed to be done were illegal, the Courts will give damages for the

(*d*) T. & R. 371.

(*e*) 3 Ves. 373; 3 Ves. 612.

(*f*) 11 Ves. 168.

(*g*) 2 H. Bl. 379.

(*h*) *Ewing v. Osbaldiston*, 2 M. & C. 53.

non-performance of the legal part. In equity, if the agreement is wholly unexecuted, the Court must decree the whole to be performed or none, and therefore any illegality as to a part, prevents the Court interfering. But if relief is asked incidental to an executed agreement, where for a valid and valuable consideration, transactions partly legal and partly illegal, have taken place; the Court gives relief as to the legal part. In *Knowles v. Haughton* (*h*), where the bill was for an account of partnership transactions in the business of brokers and underwriters; the partnership as to the underwriting business being illegal, the account was directed of the broker's business only. In *Mestaer v. Gillespie*, and more recently in *Davenport v. Whitmore*, it was decided that an assignment of the ship and freight, which was void as to the ship on account of its being against the policy of the Ship Registry Acts, might yet be good as to the freight (*i*).

Sir A. Hart, L. C. I., said "I have found no case in which a bargain, made in direct contravention of the policy of the Court, has been allowed to stand, merely because it had been submitted to for many years. There are many cases in which relief has been given after great lapse of time. The cases of *Beaumont v. Boulton* (*j*), *Randall v. Errington* (*k*), and *Wood v. Downes* (*l*), are marked cases of this kind" (*m*).

(*h*) 11 Ves. 168.

(*k*) 10 Ves. 423.

(*i*) 11 Ves. 629; see p. 636, 2
M. & C. 177.

(*l*) 18 Ves. 120.

(*j*) 5 Ves. 485; 7 Ves. 599.

(*m*) *Molony v. L'Estrange*,
Beatty, 415.

CHAPTER X.

The Court will not enforce a Contract upon which there is an adequate Remedy at Law.

WHERE there is a remedy at law as well as in equity, the Court has a discretion in giving or withholding relief, according to the special circumstances of every case.

It is laid down generally that the Court will not perform contracts relating to personalty, because damages at law are an adequate remedy for the breach of contract; but this rule can only apply to cases where damages at law are to be recovered, and where, therefore, the Court has this kind of discretion.

If the plaintiff has no title at law, he can, as a matter of course, come into a Court of Equity to enforce a right.

In *Doloret v. Rothschild*, the suit was to enforce an agreement for the delivery of scrip receipts for Neapolitan stock: the Vice Chancellor said, "I consider also that the plaintiff, not being the original holder of the scrip, but merely the bearer, may not be able to maintain any action at law upon the contract; that if he has any title, it must be in equity:" and he overruled a demurrer to the bill (a).

(a) 1 S. & St. 598.

In *Lynn v. Chaters*, which was a bill for the specific performance of an agreement for the sale of a ship, it was objected, that the Court had no jurisdiction; that it could not decree specific performance of a contract for a chattel. The defendant relied upon *Brewster v. Clarke*, in which no objection was taken to a bill for specific performance of an agreement respecting a ship, on this ground. Lord Langdale supported the bill, but on the ground that the money had not been paid, although a receipt had been given for it, which was an answer at law; the relief was, therefore, in equity only (*b*).

But, although in all cases, equity will entertain a suit respecting a chattel where the plaintiff's title is only in equity, yet if the chattel has passed into the hands of a purchaser for valuable consideration, without notice, the Court can only put the plaintiff into such a position as to enable him to recover damages at law, as it is no part of the jurisdiction of a Court of Equity, to decree the payment of damages (*c*).

The cases of contracts respecting personal chattels afford a fertile ground for discussion: the true principle is, that if damages are an adequate remedy, equity will not entertain the suit; a principle not confined to contracts respecting personal chattels, but extending to agreements of every kind (*d*).

This principle is clearly deducible from the decided cases on the subject.

In *Cud v. Rutter*, Sir Joseph Jekyll, M. R., decreed

(*b*) 2 Keen, 521.

(*d*) See *Flint v. Brandon*, 8

(*c*) Per Lord Thurlow. *Lucas v. Comerford*, 3 B. C. C. 167.

Ves. 159.

the specific performance of an agreement to transfer South Sea stock: this was reversed by Lord Macclesfield, who said that a Court of Equity ought not to execute any of these contracts, but to leave them to law, where the party is to recover damages, and with the money may, if he pleases, buy the quantity of stock agreed to be transferred to him; for there can be no difference between one man's stock and another's. It is true, one parcel of land may vary from and be more commodious, pleasant, or convenient than another parcel of land; but £1000 South Sea stock, whether it be A., B., C., or D.'s, is the same thing, and in no sort variant; and, therefore, if he has a right, he may recover in damages, with which, when received, he may buy the stock himself (*e*).

Lord Hardwicke says, "In general the Court will not entertain a bill for specific performance of stock, corn, hops, &c.; for as those are contracts which relate to merchandize, that vary according to different times and circumstances, if a Court of Equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action, that party might not have paid, perhaps, above a shilling damages. But, notwithstanding this general distinction between personal contracts and for goods and contracts for lands, yet there are indeed some cases where persons may come into Court upon contracts merely personal" (*f*).

Mr. Cox, in his note to *Cud v. Rutter*, says cases of this kind depend so much on their own particular

(*e*) 1 P. W. 570.

(*f*) *Buxton v. Lister*, 3 Atk. 383.

circumstances, that it seems no general rule can be laid down (*g*). But I apprehend the general rule is, that wherever damages is an inadequate remedy, specific performance will be decreed of such a contract; and that, unless it appears on the face of the bill, that damages will be a sufficient remedy, a demurrer will not be allowed.

Where the prayer of the bill was, in the alternative, either that the defendant might transfer the stock to the plaintiff, or pay the difference: Lord Chancellor King overruled a demurrer to the bill, saying, that this case might at the hearing appear to be attended with such circumstances as might make it just to decree the defendant either to do one or the other (*h*).

Things, which, according to the common law, are merely chattels, may yet have a peculiar value, and the reason of the Courts giving relief in the case of land, that the purchaser is entitled to have the actual thing contracted for, is just as applicable to many chattels.

In *Pearne v. Lisle*, Lord Hardwicke said, "As to the merits, a specific delivery of the Negroes is prayed; but that is not necessary, others are as good; indeed, in the case of a cherry stone very finely engraved, and likewise of an extraordinarily wrought piece of plate, for the specific delivery of which bills were brought in this Court, they could not be satisfied any other way; their value arose on circumstances peculiar to themselves; but in other things, as diamonds, one may be as good as another" (*i*).

(*g*) 1 P. W. 571, Cox's edition.
 (*h*) *Colt v. Netterville*, 2 P. W. 303. See *Forrest v. Elwes*, 4 Ves. 492, and the observations of Lord Alvanley in that case, p. 497.

(*i*) Amb. 77. As to diamonds, see *Ximenes v. Franco*, Dick. 149; *Timmins v. Prout*, Dick. 387, *inf.* p. 241.

The familiar cases of bills in equity for the delivery up of particular articles, such as the Pusey horn, by which the Pusey lands are held, the ancient silver altar piece belonging to the lord of the manor as treasure trove, the tobacco box belonging to a benefit club, and a valuable picture, are instances of the Court enforcing the trust by which the person holding the articles was affected, upon the ground that damages in an action of trover were an inadequate remedy (*j*).

In *Earl of Macclesfield v. Davis* a bill was filed for the delivery of an iron chest, containing certain articles intended to be heir-looms, Lord Eldon said, "It is now too late, since the case of *Fells v. Read*, following *Pusey v. Pusey*, to discuss whether this Court will interfere for the specific delivery of a chattel; and if it will in such a case, *a fortiori*, the restitution of heir-looms must be decreed, upon which there never was any doubt" (*k*).

Upon the same doctrine the jurisdiction of the Court is supported in the very common case of a bill for delivery of deeds or writings, suggesting that they are in the custody or power of the defendant; in very early times it seems to have been considered that the jurisdiction did not extend to cases where an action of detinue will lie (*l*), but it was in common exercise in the reign of Queen Elizabeth (*m*), and in the preceding reign an injunction was granted to deliver up plate (*n*).

(*j*) *Pusey v. Pusey*, 1 Vern. 293; *Duke of Somerset v. Cookson*, 3 P. W. 389; *Fells v. Read*, 3 Ves. 70; *Lowther v. Lowther*, 13 Ves. 95.

(*k*) 3 V. & B. 18.

(*l*) *Dixon on Title Deeds*, vol. 1, p. 175.

(*m*) *Glasiers v. Massie*, 21 & 22 Eliz., Cary, 109.

(*n*) 5 & 6 Ph. & M., Lord Keeper Heath, Cary. As to the right to sue for deeds in equity, *Jackson v. Butler*, 2 Atk. 306; *Walwyn v. Lee*, 9 Ves. 33; *Crow v. Tyrrel*, 3 Mad. 179.

Now, the mode in which the person holding the chattels is constituted a trustee, whether by having received them from the owner, or by having contracted to sell them, for valuable consideration, can make no difference.

Accordingly, Lord Hardwicke says, "As to cases where the Court would compel a specific performance, a man may contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber, and this on the part of the buyer" (*o*); in *Mason v. Mason*, articles for the sale of timber were carried into execution, and Sir John Leach, V. C., allowed the principle in a recent case (*p*).

In *Arundell v. Phipps*, Lady Arundell, with her separate estate, had contracted to purchase from her husband certain statues, family pictures, and furniture, Lord Eldon observed, "Another ground upon which Lady Arundell is entitled to relief here is, that from the very nature of the property in question, the quantity and nature of the property alleged to be purchased, the purpose and object of the purchaser, it is quite impossible for her to have the benefit of it, if a *bond fide* transaction, unless she can specifically enjoy it; and this Court having, in many instances, interposed to protect the enjoyment of a specific chattel, the question is, whether the very object and subject of the contract do not make it necessary to consider, whether the Court cannot give the specific relief of fixing on the trustees the very property, instead of the amount in damages" (*q*).

(*o*) *Buxton v. Lister*, 3 Atk. 383.

(*p*) In *Clavering v. Clavering*,
Moseley, 224; *Arkwright v. Stoveld*,

1824, 1 C. P. Coop. Ca. t. Cotten-
ham, p. 499.

(*q*) 10 Ves. 149.

In *Nutbrown v. Thornton* (*r*), the same kind of relief in respect of personalty was given upon a lease, the landlord advanced money to enable his tenant to stock his farm, with an agreement that if more than the money advanced was in arrear, the landlord should enter and sell the stock. The landlord having entered with a view to put in force his remedy by bill of sale, the tenant filed a bill, praying that the possession of the stock and effects in the bill of sale should be restored to him; Lord Eldon said, "The circumstances of a trust by way of deposit, as in *Fells v. Read* (*s*), is not required in this instance to furnish the principle upon which the Court might be called upon to interpose; for the law would make him a trustee; and by the express contract, he would be so. The simple ground of the bill is, that the tenant bargained for the enjoyment of the farm for the purpose of agriculture: and, in fact, for the enjoyment of the stock for seven years. It is said the plaintiff might have damages, but how are damages to be estimated in such a case? The direction to a jury must be to give, not the value of these chattels merely; but their value to this man, having this farm, enabling him to use them for the purpose of cultivation; and the very terms of the contract shew the landlord thought him not able to stock the farm without a very large indulgence through the whole term."

In *Doloret v. Rothschild* (*t*) the bill, as we have seen, was filed to obtain the delivery of scrip receipts, and it was demurred to on the ground that the Court would

(*r*) 10 Ves. 159.
(*s*) *Ubi supra*.

(*t*) 1 S. & St. 598, see *sup.*
p. 234.

not entertain a bill for the transfer of stock. Sir John Leach, V. C., in overruling the demurrer, said, "I am of opinion, that inasmuch as this bill prays a delivery of the certificates which would constitute the plaintiff the proprietor of a certain quantity of stock, the bill in equity will hold; because a Court of Law could not give the property, but would only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party."

This doctrine, if it is to be relied on, would establish the jurisdiction of equity to perform contracts, in which damages would be an adequate remedy, on the ground of the damages being secured only by the personal responsibility of the defendant.

It seems probable that, before the vendor has parted with the property which he has contracted to sell, the Court will so far act upon the contract as to restrain him from selling to any other person.

Lord Hardwicke seems to have thought that a party having a specific right to certain goods, as diamonds, and shewing that they are in danger of being lost, might obtain an injunction to restrain the disposition of them (*u*); and in *Timmins v. Prout*, Lord Camden, C., restrained the defendant before he had prayed time to answer, or was in contempt from selling diamonds, to which the plaintiff by his bill claimed a title (*v*).

In *Wood v. Rowcliffe*, the case made by the bill was that certain specific chattels described in an inventory, were placed in the possession of Elizabeth Wright, to

(*u*) *Ximenes v. Franco*, Dick. 149, see *sup.* 237.

(*v*) Dick. 387.

be held by her as the agent of the plaintiff; and that in breach of her duty to her principal, she had contracted for the sale of these goods to a third party. The bill was demurred to, on the ground that damages at law were a full and sufficient remedy. The Vice Chancellor Wigram overruled the demurrer. He said, "The question is, whether a Court of Equity will not, at the suit of the principal, restrain his agent from parting with the possession of his property, by which the plaintiff's title would be embarrassed, if not defeated? I have not the slightest doubt that the plaintiff is entitled to the protection of the Court, against the wrongful act which is threatened by his agent. I have known many bills to have been filed in the Court of Exchequer, formerly, on behalf of the owners of cargoes, to prevent improper dealings with the goods, by their agents, or persons in the situation of agents. The right to be protected in the use or beneficial enjoyment of property in specie, is not confined to articles possessing any peculiar or intrinsic value" (*w*).

If a party contracted to sell goods of no peculiar value, and was proceeding to sell them to another, would not this be a breach of the trust, with which by his first agreement, his conscience was bound?

But in *Doloret v. Rothschild*, as we have seen, the circumstances that the scrip receipts were the only

(*w*) 3 Hare, 304, affirmed by Lord Cottenham, C., 11 Jur. 915, but as to proceeding against the sheriff by injunction, see *Jackson v. Stanhope*, 15 L. J., N. S. Eq. 446;

and compare *Newell v. Townsend*, 6 Sim. 419; *Rowe v. Wood*, 2 Sw. 234; *Langton v. Horton*, 3 Beav. 464.

means by which the party buying the stock could shew that he was the proprietor, and that the bill was for the delivery of these receipts, were sufficient grounds to support it. For whenever the contract between the parties is to give the one party the means of establishing his rights at law, Equity will interfere, thus in *Wright v. Bell*, the Court of Exchequer decreed the specific performance of an agreement to sell a debt: it was, in fact, merely decreeing an assignment of the debt to be duly executed, so that the assignee might recover the debt at law. The Lord Chief Baron remarked, that the contract was not for the payment of money, but to do that which will enable the plaintiff to recover the money (*x*).

In *Jackson v. Cocker*, the bill was filed by the vendor for the specific performance of an alleged agreement for the purchase of certain shares in a railway company. The Master of the Rolls dismissed the bill, on the ground that it was a purchase of mere certificates, and that such purchase involved no such implied agreement as the bill was founded upon, but no objection was made because of the nature of the subject-matter of the agreement (*y*).

In *Duncuft v. Albrecht*, the bill was filed for the specific performance of an agreement, to sell a certain number of railway shares. It was objected that the Court would not perform such a contract. But Sir L. Shadwell, V. C., decided that it would. He said, "The only question is, whether there has been any decision from whence you can extract a conclusion,

(*x*) *Daniell's Ex. Rep.* 100. See there cited.
the Editor's note, and the cases (*y*) 4 *Beav.* 28.

that the Court will not decree a specific performance of an agreement for the sale of such shares? Now I agree that it has been long decided, that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But in my opinion, there is not any sort of analogy between a quantity of 3*l.* per cent. or any other stock of that description, (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description; which railway shares are limited in number, and which, as has been observed, are not always to be had in the market, and as no decision has been produced to the contrary, my opinion is, that they are a subject with respect to which an agreement may be made which this Court will enforce" (z).

In *Adderley v. Dixon*, the principle which is now contended for was made by Sir John Leach the ground of his supporting the bill; this was for the specific performance of a contract of sale of debts, proved under a Commission of Bankruptcy. "Courts of Equity," said the Vice Chancellor, "decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus, a Court of Equity decrees performance of a contract for land, not because of the real nature of land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchasers

(z) 12 Sim. 189, affirmed by the Lord Chancellor.

to whom the land may have a peculiar and special value. So a Court of Equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser, as the delivery of the stock or goods contracted for, inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods. In *Taylor v. Neville*, cited in *Buxton v. Lister (a)*, specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years and by instalments; and the reason given by Lord Hardwicke is, that such sort of contracts differ from those that are immediately to be executed. And they do differ in this respect, that the profit upon the contract, being to depend upon future events, cannot be correctly estimated in damages where the calculation must proceed upon conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it, at a conjecture price. In *Ball v. Coggs (b)*, specific performance was decreed in the House of Lords, of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred weight of brass-wire manufactured by the defendant during the life of the plaintiff. The same principle is to be applied to this case. Damages might be no complete remedy, being to be calculated merely by

(a) 3 Atk. 383.

(b) 1 Bro. P. C. 140.

conjecture; and to compel the plaintiff in such a case to take damages, would be to compel him to sell the annual provision during his life, for which he had contracted, at a conjectural price * * *. The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts; it appears to me that upon the principle established by the cases of *Ball v. Coggs*, and *Taylor v. Neville*, a Court of Equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends: and to compel the purchaser to take such damages would be to compel them to sell these dividends at a conjectural price" (c).

In *Clifford v. Turrill*, there being an agreement for the purchase of an annuity of £40 a year. Sir J. K. Bruce, V. C., decreed specific performance of the agreement and payment of the annuity for the future, although no security for its payment was directed. Lord Lyndhurst, C., supported the decision; after noticing other objections, he said, "the only remaining point is, whether the Court will decree specific performance of an agreement, to grant an annuity not charged upon land, but a mere personal annuity. It was said that the party might go to a Court of Law and recover damages for the breach of the agreement, and therefore it was not a case for the interference of a Court of Equity. The answer to that is this: that there are several cases in which the contrary has been decided, and the point has been decided in the House of Lords. Damages at

(c) *Adderley v. Dixon*, 1 S. & St. 607; *Wright v Bell*, *ubi sup.*

law would be estimated by a jury, according to the average duration of human life, but it might or might not be a sufficient compensation, as the party might live beyond the average period of life. Damages therefore would not necessarily be a compensation, I am, therefore, of opinion, that the specific performance of an agreement for a personal annuity can be had in this Court, and that this is a case for such a specific performance" (*d*).

The cases alluded to by the Lord Chancellor, are some in which the growing payments of an annuity were ordered (*e*), and others where the point was considered as open to no dispute (*f*).

(*d*) 1 Y. & C., C. C. 138, before the Lord Chancellor, 9 Jur. 633.

(*e*) Lady Herbert *v.* Earl Powis, 6 Bro. P. C. 102; Lord Carbery *v.* Weston, 5 Bro. P. C. 246; Cooke

v. Wiggins, 10 Ves. 191.

(*f*) Vaughan *v.* Thomas, 1 Bro. C. C. 558; Withy *v.* Cottle, 1 S. & St. 174.

CHAPTER XI.

An unreasonable Contract, upon which there can be relief at Law, will not be enforced in Equity.

It is frequently laid down that the specific performance of contracts is discretionary: that the Court, knowing that a party may have such a compensation as a jury will award him in the shape of damages for the breach of contract, will not in all cases decree a specific performance (a).

But this discretion is only exercised when damages can be recovered, and the general principle is more correctly enunciated by Sir J. K. Bruce, V. C., who says, "Where no legal invalidity affects the contract, the performance of it, in this Court, is matter of judicial discretion" (b).

If there is no other remedy for breach of contract, than that afforded by a Court of Equity, the Court must decide according to strict legal right. In *Attorney General v. Day* (c), Lord Hardwicke clearly stated the distinction. "The general rule certainly is, that this [decreeing a specific performance] is discretionary in the Court, but will not hold in the present, for that is generally in cases where there may be election of

(a) *Flint v. Brandon*, 8 Ves. 159. C., C. C. 54; see p. 64.

(b) *Salisbury v. Hatcher*, 2 Y. & (c) 1 Ves. sen. 222.

two remedies, by coming here for specific performance, or by action at law; whereas, here there can be no remedy at law; all arising under the acts of this Court, from that order [for sale] amounting to a decree. So that, if this Court does not carry it into execution, it cannot be at all." And, in *Floyer v. Sherard* (*d*), he said, "In the present case, there is no difference between setting the agreement aside, and not giving relief. There is no way of coming at the dividends but in this Court, being equitable estate in the defendant; and, therefore, it is not coming into this Court for assistance; but as it is a grant of an equitable estate, it is necessary to come into this Court: therefore, in a case of this kind, the Court is as much bound to give its relief as if it was a legal title, and an action brought at law."

Sir Wm. Grant, in the case of *Essex v. Atkins* (*e*), (which was a suit against a married woman with respect to her separate estate) said, "As it is only in Equity that the contract of a married woman with regard to her separate property can be at all enforced, the Court must of necessity decide upon its validity. The Court cannot leave the purchaser to his legal remedy; for he has none: not to act is the same thing, in effect, as setting aside the contract. * * * There is nothing in the evidence that would have entitled me to set aside the contract, if she had filed a bill for that purpose. The consequence is, that I must enforce the contract upon the plaintiff's suit."

As to setting aside the agreement, we find the

(*d*) Amb. 18.

(*e*) 14 Ves. 542.

following rule laid down by Lord Hardwicke, in *Willis v. Jernegan* (*f*). "It is not sufficient to set aside an agreement in this Court, to suggest weakness and indiscretion in one of the parties who has engaged in it; for, supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can shew fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement."

But when there are two remedies, and a discretion, it is a general rule that an unreasonable, hard and unconscionable agreement will not be enforced.

Any circumstance of hardship in the defendant's situation, it is said, will incline the Court not to interfere, but to leave the plaintiff to his legal remedy (*g*). In *Armiger v. Clarke* (*h*), the Judges thought the objection of hardness more forcible in the case of a defendant, who was the purchaser, than if he were the vendor; because the vendor could get all that he asked by his bill at law.

The doctrine is somewhat loosely stated by Lord Erskine, "Though, from want of attention, misrepresentation, and mistake, a party may have acquired a right at law, the Court will not, especially, if upon other circumstances the case is hard, decree a specific performance; but the law is open to him (*i*). Upon this subject, the Court is governed by a sound, not a capricious and arbitrary discretion" (*j*).

(*f*) 2 Atk. 251.

(*g*) Per Lord Brougham, C., in *Gould v. Kemp*, 2 M. & K. 308.

(*h*) Bunb. 111.

(*i*) *Joynes v. Statham*, 3 Atk. 388.

(*j*) *Mason v. Armitage*, 13 Ves. 25.

Equity will not admit bills which would enforce the execution of contracts which would tend to the ruin of one party (*k*).

The Court will not interfere to perform a hard bargain. In *Kimberley v. Jennings*, the agreement was so constructed, that if from illness, or any other cause over which the defendant could have no control, he should become incapable of serving the plaintiffs, they had the option of either discharging him, or discontinuing the payment of his salary, and insisting that for the remainder of the six years he should not engage in the service of any other individual. "Nothing," observed Sir L. Shadwell, "could be more harsh towards a young man, dealing with great traders, than that he should be allowed to enter into an agreement which placed him so entirely in their power. * * * It is a hard bargain, and therefore this Court will not interfere" (*l*).

In *Talbot v. Ford*, a lease of mines contained a covenant on the part of the lessee, that in case the lessor, his heirs or assigns, should, at any time before the expiration or sooner determination of the lease, give notice to the lessee of his or their desire to take any part of the machinery at a valuation, the lessee should, at the expiration or sooner determination of the lease, give up the machinery to the lessor. The Vice Chancellor's opinion was, that the covenant was so injurious and oppressive to the lessee, that this Court ought not to interfere for the purpose of giving effect to it (*m*).

(*k*) *Buxton v. Lister*, 3 Atk. 383; *Smith v. Morris*, 2 B. C. C. 311.

(*l*) 6 Sim. 340; *Croft v. Haw*, 5 L. J. Rep., N. S. Eq. 305.

(*m*) 13 Sim. 173.

Lord Thurlow was disposed to attach but little weight to such an objection to a specific performance, and his language, although stronger than can be fairly borne out by the cases, shews that great caution is required in the application of the principle. "I am not very anxious," said he, "to discuss the point what bargains the Court will execute or not; but when the Court has laid it down, as an article of the equity which men shall obtain here, and which they cannot obtain at law, that, instead of damages, they shall have a specific performance; and that every agreement must be performed, unless something at the time of making the bargain, or something done since, is to amount to a waiver of it, at the time of carrying it into execution; if you do not confine yourself within that limit, there are no bounds whatsoever; for rules ought to be fixed, and it would be calamitous that the matter should rest upon such loose expressions as hard and unconscionable: which expressions, unless they are properly applied, mean little or nothing." And, afterwards, he added, "I think that, without entering into the particulars of the case, the Master of the Rolls has done right; for no case can be cited, where parties have made a bargain with their eyes perfectly open, and no surprise whatever, as in this case, in which the Court has refused to decree a specific performance" (n).

Lord Eldon once observed, "This case has been represented by the defendants as a case of hardship. * * * But, unless hardship arises to a degree of inconvenience and absurdity, so great that the Court

(n) *Adams v. Weares*, 1 B. C. C. 567.

can judicially say, 'such could not be the meaning of the parties,' it cannot influence the decision" (*o*). On another occasion Lord Eldon said, "The Court has always exercised the discretion of withholding its assistance from the performance of unreasonable agreements" (*p*).

The principle upon which the rule of not performing an unreasonable agreement is founded, seems to be, that it is impossible to conceive a man intentionally entering into such an agreement.

On this ground Lord Thurlow himself thought, that where a man, entitled to an estate of inheritance, agreed to make leases with a covenant for perpetual renewal, each lease to contain the same covenant for ever, that was a species of covenant not to be executed by the Court: it could not be supposed that this was intended; Lord Eldon however held, that decided cases had established the rule, that such covenants were to be specifically performed (*q*). And neither Lord Thurlow nor Lord Eldon, would give any assistance in the nature of specific performance of an agreement, entered into among the members of a friendly society, which could not be fairly carried out so as to effectuate their intention, and the legal result of which the parties could not have foreseen (*r*).

In *Coke v. Bishop*, the defendant had entered into articles with the plaintiff, to settle upon him all his

(*o*) In *Prebble v. Boghurst*, 1 Sw. 309.

(*p*) *Wood v. Griffiths*, 1 Sw. 43; see *Duke of Bedford v. the Trustees of the British Museum*, 2 M. & K. 552; *Caryll v. Chamberlain*, Vin. Ab. H. 14 July, 1721; *Stan-*

hope v. Toppe, 2 B. P. C. 183.

(*q*) *Willan v. Willan*, 16 Ves. 216.

(*r*) *Pearce v. Piper*, 17 Ves. 1; *Beaumont v. Meredith*, 3 V. & B. 180; *Buckley v. Cater*, 17 Ves. 15.

real and personal estate, which he had or should have, except £3000. A decree was made to settle all he then had; but Lord Nottingham said, "An attempt was made before me to have a new decree against the defendant to settle new acquisitions made by him; but I did not think a Court of Conscience obliged to execute such a strange agreement any further than it had been carried already, since it tended to the discouragement of all honest industry: so the suit failed" (*s*).

So in a recent case, the Vice Chancellor Knight Bruce refused to assist in equity, a claim under an agreement made between two young officers of the Guards, that the one who died first should leave the survivor £3000. He said it was not such a demand as a Court of Equity would give effect to; the documents bore upon them every mark of improvidence (*t*).

It is on the principle of the performance of contracts being discretionary with the Court, that parol evidence is allowed to rebut an application for specific performance (*u*). If there were no discretion, the same rule would prevail in equity as at law, that an agreement proved by writing, cannot be disproved by parol evidence; if the Court, where alone relief could be obtained, allowed parol evidence to be received, which prevented the relief being granted; this would be as effectual as admitting parol evidence to disprove the agreement having been made.

Lord Hardwicke said, it being discretionary in the Court to decree specific performance or not; has not

(*s*) 3 Swanston, 401. See observations of Lord Cottenham, C., in *Hill v. Gomme*, 5 M. & C. 250, p. 253.

(*t*) *Ryan v. Daniell*, 1 Y. & C., C. C. 6.

(*u*) *Legal v. Miller*, 2 Vesey, sen. 299.

the defendant a right to insist either on account of an omission, mistake or fraud, that the plaintiff shall not have a specific performance? It is a very common defence in this Court, and there is no doubt but it ought to be received, and quite equal, whether it is insisted on as a mistake or a fraud (*v*).

Lord Eldon thought that fraud was, perhaps, more examinable at law, but he "said all the doctrine of the Court as to cases of unconscionable agreements, hard agreements, agreements entered into by mistake or surprise, which therefore the Court will not execute, must be struck out, if it is true, that because parol evidence should not be admitted at law, therefore it is not to be admitted in equity, upon the question, whether, admitting the agreement to be such as at law it is said to be, the party shall have a specific execution or be left to that Court, in which, it is admitted, parol evidence cannot be introduced; a very small research into the case will shew general indications by judges in equity, that that has not been supposed to be the law of this Court * *. The Court must be satisfied that under all the circumstances, it is equitable to give more relief than the plaintiff can have at law. It is competent to this Court, at least for the purpose of enabling it to determine whether it will specifically execute an agreement, to receive evidence of the circumstances under which it was obtained" (*w*).

(*v*) *Joynes v. Statham*, 3 Atkins, 388.

hend v. Stangroom, 6 Ves. 328, see pp. 333. 338.

(*w*) In *The Marquis Towns-*

CHAPTER XII.

The Conduct of the Party seeking performance must have been correct.

THE Court insists that the conduct of the party seeking its aid be free from all reproach: he must claim the assistance of the Court promptly, and prosecute his suit with diligence: he must have been guilty of no fraud or misrepresentation, or unfairness, or have even attempted anything of the kind.

"A bill for the specific performance of an agreement," said Lord Manners, L. C. I., "is an application to the discretion, or rather to the extraordinary jurisdiction of this Court, which I apprehend cannot be exercised in favour of persons who have long slept upon their rights, and acquiesced in a title and possession adverse to their claim. Due diligence is necessary to call the Court into activity, and where it does not exist, a Court of Equity will not lend its assistance, it always discountsenances laches and neglect * * *. Upon the principles adopted by Courts of Equity, in respect to cases seeking a specific execution, I think the laches equally as strong against a plaintiff in not prosecuting, as in not commencing a suit" (a).

In *Stone v. Yea*, which was a bill to enforce an

(a) *Moore v. Blake*, 1 Ball & Beatty, 69.

agreement to contribute towards the expenses of a lawsuit, the contract had been made nearly twenty years before the bill was filed; this lapse of time was urged as an objection to the bill. Sir William Grant observed, "With respect to the length of time, it is said, that being a contract under seal, it is not barred till twenty years have elapsed; but to that I cannot assent; for if there be a contract under seal to convey an estate, the Court would not enforce it, if nothing had been done under it for a long time, although that time might be less than twenty years. Besides which, this suit is not to compel the payment of a legal debt under the contract, but to enforce the right of contribution, a collateral right depending upon the contract. Upon the general principle that parties are not to sleep upon their rights, I think it was incumbent on the plaintiff to shew why this suit was not commenced before; a much less lapse of time than twenty years is a sufficient ground for refusing relief in a case like this" (b).

It is incumbent on a plaintiff asking for a specific performance, to shew that he has used due diligence, or if not, that his negligence has been acquiesced in; and it is not necessary for the party resisting the performance, to prove any particular injury or inconvenience; "The question is," said Lord Alvanley, M. R., "whether the plaintiff has done enough to shew he took all the pains he could to be ready to carry into execution the agreement" (c).

(b) Jacob, 436; Barrett v. Blagrove, 6 Ves. 104; Roper v. Williams, T. & R. 18.

(c) Guest v. Homfray, 5 Ves. 818; Alley v. Deschamps, 13 Ves. 225.

But if the contract has been in fact, though not formally, executed, as in the case of an agreement for a lease, if the one party has entered into possession, and the other has received rent, the doctrine of laches does not apply. In *Clarke v. Moore*, the objection was urged on such a state of things, but Sir Edward Sugden, L. C. I., said, "I never before heard the doctrine of laches applied to a contract, which was in point of fact executed. This is not the case of a contract remaining in *feri*, in the proper sense of the word; but in the view of a Court of Equity, this contract amounts to a lease, the one party giving and the other taking possession, laches therefore, has nothing to do with the case. It is new to me to hear it argued, that because a party has neglected for a long time to call for the execution of a contract for a lease, he being in enjoyment of the benefit given to him by the contract, therefore he is not at liberty to enforce it at any time before the term expires" (*d*).

We must be careful not to confound with ordinary cases of laches those decisions which give to a very short delay in coming to the Court, under certain circumstances, the effect of barring the right to relief.

In *Lloyd v. Collett*, a delay of seven months in filing the bill for specific performance, after a demand by the purchaser for the deposit, induced Lord Rosslyn to dismiss the bill (*e*). In *Heaphy v. Hill*, where a lessee filed a bill for the specific performance of an agreement for a lease, two years after the defendant had given notice to the plaintiff of his intention not

(*d*) 1 Jones & Lat. 729.

(*e*) 4 Bro. C. C. 469; see *Hayes*

v. Caryll, 1 B. P. C. 27; *Wingfield*

v. Whaley, 2 B. P. C. 447.

to perform the contract, Sir J. Leach, V. C., dismissed the bill (f). In *Watson v. Reid*, where eleven months elapsed after the purchaser claimed his deposit, the same Judge (then Master of the Rolls) refused relief, because of the unreasonable delay in filing the bill (g).

"These three cases," says Sir J. Wigram, V. C., "are direct authorities, that if one of two parties, concerned in a contract respecting lands, gives the other notice that he does not hold himself bound to perform, and will not perform his contract between them, and the other contracting party to whom the notice is so given, makes no prompt assertion of his right to enforce the contract, equity will consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the contract, and will leave the parties to their remedies and liabilities at law" (h).

The Court must be satisfied of the integrity and good faith of the parties seeking its aid (i). "The Court," said Lord Eldon, "in many cases has been in the habit of saying that where parties deal for an estate, they may put each other at arm's length: the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of his property, as in the case that has been mentioned (j), if an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give

(f) 2 S. & St. 29.

(g) 1 R. & M. 236.

(h) *Walker v. Jeffreys*, 1 Hare, 348; see *King v. Wilson*, 6 B. 126. *Benson v. Lamb*, 9 B. 502.

(i) Per Lord Lyndhurst, *Younge*, 327. See *Phillips v. Duke of Buckingham*, 1 Vern. 229.

(j) 2 Bro. C. C. 420.

him any information of it, he acts for himself and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate" (*k*).

The Court will give no relief to a party who has been guilty of any fraud or misrepresentation: his conduct must be free from all imputation. In *Cadman v. Horner* (*l*), Sir William Grant, M. R., said, "Upon the evidence the plaintiff has been guilty of a degree of misrepresentation, operating to a certain, though small extent; that misrepresentation disqualifies him from calling for the aid of a Court of Equity, where he must come, as it is said, with clean hands. He must, to entitle himself to relief, be liable to no imputation in the transaction." Again, in *Clermont v. Tasburgh*, Sir Thomas Plumer, M. R., uses similar language: "there is no authority anywhere, no case where the Court has, when misrepresentation was the ground of a contract, decreed the specific performance of it: and nothing would be more dangerous than to entertain such a jurisdiction. The principle on which performance of an agreement is compelled, requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame: misrepresentation, even as to a small part only, prevents him from applying here for relief" (*m*).

Unless perfect good faith has been kept by the

(*k*) Jacob, 178.
(*l*) 18 Ves. 10.

(*m*) 1 J. & W. 110; see p. 119.

party applying for the assistance of the Court, it will be withheld. In *Beaumont v. Dukes* (*n*), the plaintiff had made certain representations as to plans, which he said he intended to carry out, and upon the faith of these representations, the defendant swore that he had entered into the contract. The plaintiff did not shew that he had taken steps to carry out the projected improvement, and the Court therefore, assuming he had done nothing, dismissed his Bill. In *Scott v. Hanson*, Sir John Leach says, "In a Bill for specific performance, it is not sufficient to say, that the purchaser has been negligent, if the vendor who seeks the aid of the Court of Equity, has, in his conduct, been incorrect" (*o*).

Any real misrepresentation, made with an intention to deceive, will bar the plaintiff (*p*) in a suit for specific performance. If there were any evidence that proved the purchaser to have misrepresented the state of the land to a person desirous of purchasing it, that will rebut his equity of a specific performance of the agreement (*q*).

In *Ellard v. Lord Llandaff*, a man in consideration of the surrender of an old lease for lives, applied for and obtained an agreement for a new one, he knew at the time of his application that the last life in the first lease was at the point of death, Lord Manners, L. C. I., refused a specific performance of the contract. He asked—"Is it not against all principles of equity that one party, knowing a material ingredient in an agree-

(*n*) Jac. 423. See *Craven v. Tickell*, 1 Ves. jun. 60.

(*o*) 1 Sim. 14. See *Rochfort v. Creswick*, 2 B. P. C. 296.

(*p*) *Pearson v. Knapp*, 1 M. & K. 312; *Brereton v. Cowper*, 2 B. P. C. 535.

(*q*) Per Lord Hardwicke, *Howard v. Hopkyns*, 2 Atk. 371. *Oldfield v. Round*, 5 Ves. 508, is said by Lord Manners (1 B. & B. 251), to have been hardly acquiesced in by the profession.

ment, shall be permitted to suppress it, and still call for a specific performance" (*r*). He, who undertaking to give information gives but half information, in the doctrine of a Court of Equity conceals (*s*).

It is quite impossible for a Court of Equity specifically to perform the contract of a vendor, admitting that he did not choose to describe the subject as it was, lest an honest disclosure of its actual state should put it into the hands of a vendee at a lower price. A Court of Equity cannot lend its assistance to such a purpose (*t*).

If an agreement for a lease has been obtained by a studious, artful and fraudulent concealment of the real purposes of the lessee; which he knew the lessor would not have granted, except under the effect of that concealment, the Court would not enforce the performance of the agreement (*u*). If a landlord, from motives of kindness to an old tenant, let to him a farm upon lower terms than he would let it to any other person, and that tenant being informed by the landlord, that he would not upon any account let that farm to a particular individual (from some clashing interests in mines), declaring himself to be a trustee for that person. The Court would pause long before it would execute an agreement under such circumstances (*w*).

In the case of *Nelthorpe v. Holgate* (*x*), Sir John Nelthorpe authorized his agent to enter into a contract for the purchase of an estate in the agent's name,

(*r*) 1 Ball & Beatty, 251.

(*s*) 3 Sw. 73; *Maddeford v. Austwick*, 1 Sim. 89.

(*t*) Per Lord Eldon, in *Devereux v. Lord Bolton*, 18 Ves. 512.

(*u*) *Bonnett v. Sadler*, 14 Ves.

525.

(*w*) Per Lord Eldon, 14 Ves. 528; see *Meade v. Webb*, 4 B. P. C. 497.

(*x*) 1 Coll. 203.

believing the seller less likely to treat with himself than with any other person, and to be likely to ask from him a larger price than from any other person. But it was not alleged by the purchaser that he would not have treated with Sir John, nor that he would have obtained a better price from him, nor was there any evidence to that effect. Sir J. K. Bruce, V. C., held that the vendor was bound by the contract. He said, "By the law of this country, as administered in every Court of Westminster Hall, the mere act of contracting with another in the name of an agent, that agent making himself liable, and not disclosing that he does not in truth contract on his own behalf, is not forbidden, but may effectively take place." Of this there can be no doubt: but his Honour is reported to have added, "If this right be exercised from a belief, well or ill-founded that, were the real relation between the agent and his principal known, the other party would, from mere caprice, or unreasonably, or from a bad motive, decline to contract, or would use the knowledge for the purpose of extortion, that can make no difference." According to Lord Eldon, if the belief were well founded, and if the fact believed were true, it would make such a difference that the Court would refuse to sanction the agreement; and in fact Sir J. K. Bruce's judgment went upon the circumstance, that the belief of Sir John Nelthorpe was neither alleged nor proved to be in conformity with the fact. This state of things would be no answer to an action at law, but it would be a ground to refuse the extraordinary assistance of a Court of Equity. His Honour said, "that if the vendor had asked if the agent was really contracting for him-

self, the answer, if false, might have been fatal to the contract."

Sir Wm. Grant, in *Featherstonhaugh v. Fenwick*, where it was alleged that the lessor was unwilling to enter into the agreement for the renewal with one of the *cestui que trusts* of the lessee, said that it made no difference, and that he should declare the lessees trustees. He alluded to the case of *O'Herlihy v. Hedges*, where Lord Redesdale would not execute the agreement as against the landlord, the ostensible tenant being solvent, but his *cestui que trust* being objected to by the landlord and insolvent; but his Honour refused to decide whether, even in that case, he would have decreed the lessee specifically to perform the agreement for the lease (y).

In *Harris v. Kemble* (z), Lord Lyndhurst said, "According to the established principles of equity, parties who seek the special aid of the Court to enforce the performance of an agreement, must be clear of the imputation of fraud or deceit in every part of the transaction. Fraud and misrepresentation operate as a personal bar to the relief. Even in Courts of Law circumstances of fraud might amount to a bar against the recovery of damages. Certainly, it is so in equity as to specific performance." But it must be remembered, that in the case before him, the House of Lords held the misrepresentation to be the foundation of the contract.

In *Fellowes v. Gwydyr* (a), the plaintiff said he was

(y) 17 Ves. 298. *O'Herlihy v. Hedges*, 1 S. & L. 123.

(z) 5 Bligh, N. R. 730, reversing 1 Sim. 111. See *supra*, Bk. I.,

cap. 3.

(a) 1 Sim. 63; 1 R. & M. 83, affirmed on appeal without costs.

the agent of Lord Gwydyr, and upon that footing contracted with the defendant. Sir L. Shadwell said, "If the plaintiff had been aware that the defendant Page would not have treated with any other person than Lord Gwydyr, and for that reason, had concealed his own interest in the transaction, the relief might perhaps have been refused."

Certainly this decision goes further in favour of a plaintiff who has not been strictly correct in his conduct than any other. Lord Lyndhurst, in affirming the decision, said, that no injury to Page was proved: but if the plaintiff had intended to injure him by the misrepresentation, it would, according to other cases, have barred his right.

In *Clapham v. Shillito* Lord Langdale, M. R., expressed his opinion, that a party attempting to deceive, though not succeeding, could not obtain the extraordinary assistance of the Court in a bill for specific performance (*b*).

This rule is only an application of the general principle of equity, that parties are not entitled to the assistance of equity beyond the law who have been guilty of such conduct. Another instance of its application is the case of an injunction asked for to protect a legal right.

In *Pidding v. How*, the plaintiff had been in the habit of selling a mixture of tea, called Howqua's Mixture, and filed a bill to restrain the defendant from selling a different mixture under the same name; this, *primâ facie*, the Court thought the defendant had

(b) M. R. 10th Feb. 1844, MS. The judgment is reported, 7 Beav. 141.

no right to do. But it appearing that the plaintiff had been guilty of some misrepresentation, Sir L. Shadwell, V. C., said, "There has been such a degree of misrepresentation, which I take to be false, held out to the public about the mode of procuring and making up the plaintiff's mixture, that in my opinion a Court of Equity ought not to interfere to protect the plaintiff till he has established his title at law. As between the plaintiff and the defendant, the course pursued by the defendant has not been a proper one: but it is a clear rule, laid down by Courts of Equity, not to extend their protection to persons whose case is not founded on truth; and as the plaintiff, in this case, has thought fit to mix up that which may be true with that which is false, in introducing his tea to the public, my opinion is, that, unless he establishes his title at law, the Court cannot interfere on his behalf" (c). In *Perry v. Truefit*, Lord Langdale, M. R., said, "I entirely agree with the observation made by the Vice Chancellor of England, in the case of *Pidding v. How*, relative to *Howqua's* mixture of tea: I do not think it is a favourable case for the interposition of this Court, to say the least of it, when a party, having bought a secret invented by a Mr. Leathart, represents to his customers and the world, 'that his admirable composition is made from an original recipe of the learned Von Blumenbach, and was recently presented to the proprietor by a very near relation of that illustrious physiologist'" (d).

(c) 8 Sim. 477.

(d) 6 Beav. 66; see p. 76; and

Hogg v. Kirby, 8 Ves. 215; *Wright v. Tallis*, 9 Jur. 946.

BOOK II.

ON THE MODE IN WHICH THE COURT ENFORCES THE SPECIFIC PERFORMANCE OF CONTRACTS.

CHAPTER I.

The real Agreement must be substantially executed.

It is the province of a Court of Equity to consider what is the real substantial agreement between the parties; if that is not executed, the Court will direct its performance; if it has been executed, this fact is an answer to an application to a Court of Equity to decree its execution, and is a ground for the interposition of the Court to prevent a use of the technical forms of law in other Courts, to claim damages for its non-performance.

Accordingly, the circumstance that something has been done, purporting to be an execution of the agreement, will be no answer to a claim of specific performance of the agreement, if the alleged execution be not in accordance with it; thus, notwithstanding deeds have been made in execution of agreements, if they are not in accordance with the actual agreement, the Court will, and often does, reform them.

What the actual agreement is may be shewn by the terms of the agreement itself, or be implied from the nature of the contract. In the case of the Duke of Bedford *v.* the Marquis of Abercorn (*a*), Lord Cottenham said, "If a settlement had been actually executed, in conformity with these articles, and it could be shewn by proper evidence that some provision in it had been inserted by mistake, and contrary to the intention of the parties and to the contract previously made between them, it would have been within the province of this Court to have corrected the error and altered the settlement accordingly:" after going through the evidence, which was documentary, his Lordship continued: "There is therefore proof of the intention of the parties and of the agreement between them, and of the instructions under which the draft of the agreement was prepared; all concurring in this, that the estates were to be limited to the sons of the marriage in tail male and not in tail general. There are, therefore, ample materials by which the error in the articles may be corrected, and the real intention and contract of the parties ascertained. I have no hesitation, therefore, in directing that a settlement should be executed in conformity with such real intention and contract, and not according to those terms of the articles, which are proved to have been introduced by mistake. In the case of *Jenkins v. Quinchant* (*b*) a settlement actually executed between the parties was corrected, a considerable time after its execution, by a letter which was proved to have formed the instructions from which

(*a*) 1 M. & C. 312; see pp. 233-4.
See the cases there quoted.

(*b*) 5 Ves. 596, note.

the settlement was prepared, and which letter differed in a most material part from the settlement actually executed."

So Lord Hardwicke directed a policy of insurance, which differed from the label, (which is a memorandum of the agreement,) to be altered according to the label (*c*).

There is great difficulty in reforming a settlement by instructions, unless the supposition is distinctly excluded that the parties did not come to some new terms (*d*) before executing it; the act of execution of the settlement cannot be supposed to be done by people incapable of knowing what it contained; if they did not choose to take the trouble to know, they would probably be bound (*e*).

The object of a settlement being to provide for the issue of a marriage, the Court, in carrying articles into execution, always presumes that the parties meant to put it as much as possible out of the power of the parents to defeat that purpose, and to appropriate the estate. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity with the presumable intention (*f*).

An agreement in equity must be actually carried out, and its real substantial object must be effected,

(*c*) *Motteux v. the London Assurance Company*, 1 Atk. 545. So a bond joint at law is joint and several in equity. *Thomas v. Frazer*, 3 Ves. 399; *Burn v. Burn*, 3 Ves. 573. A joint obligation given for a joint debt, previously due, is joint and several in equity. *Sumner v. Powell*, T. & R. 423.

(*d*) *Bunbury v. Lloyd*, 1 Jones

& Lat. 660.

(*e*) *Anon. Skinner*, 159, reported in 1 Jones & Lat. 661, and judgment of the Lords in *Duke of Beaufort v. Neeld*, 12 Cl. & Fin. 248.

(*f*) *Blackburn v. Stables*, 2 V. & B. 369; see also *West v. Erissey*, 3 B. P. C. 327.

and not that which seems to be the object. This is the rule in the case of bonds as a penalty against the breach of agreements to do or not to do particular acts, the Court performs the agreement.

It may be that the penalty must be considered as of the essence of the contract, as where the contract would otherwise be unreasonable and bad (*g*), for if the parties have agreed that the party shall do an act, paying the penalty, equity cannot interfere: this is therefore a question of construction (*h*). The case of *Rolfe v. Peterson*, was the case of a demise of land to a lessee, to do with it as he thought proper; but if he used it in one way, he was to pay one rent, and if in another, another; this is quite a different case from an agreement not to do a thing with a penalty for doing it (*i*).

It becomes obviously a question of some difficulty, when the covenant is to pay a rent for breaking up meadow; if it is to pay a gross sum, there is no doubt; but the general leaning of the Courts is to consider the rent as a penalty, and to restrain the act by injunction. If the tenant does the act, he must pay the penalty, but the Court will interfere before he does it (*j*).

Sir Edward Sugden, L. C. I., says, "Where the covenant is that he shall not do the act, and if he do, he shall pay a satisfaction or penalty, the Court will fasten upon his express contract, and will say, you

(*g*) *Magrane v. Archbold*, 1 Dow. P. C. 107.

(*h*) *Woodward v. Giles*, 2 Vern. 119; *Rolfe v. Peterson*, 2 B. P. C. 36.

(*i*) Per Lord Rosalyn, in *Hardy v. Martin*, 1 Cox, 27.

(*j*) 1 Conn. & Law, 469; *Webb v. Clarke*, Fomb. Tr. of Equity, 151.

cannot fall back upon the penalty and say, I will break up your ground, and here is the £100. The ground on which the Court proceeds, is the real intention of the parties: the jurisdiction of this Court to compel parties to do the very act which they have agreed to perform, has been productive of the best results, and has led to a system of good faith among Englishmen. *Chilliner v. Chilliner* (*k*), which has been cited, shews that it is settled, that though the penalty be small and the property large, yet you may enforce the agreement—it is considered an agreement independent of the penalty, and a Court of Equity will fasten upon it as such. That case went to the House of Lords, and the principle was fully established, and it contains within it the rule of the Court. The general rule of equity is, that if a thing is agreed to be done, and a penalty is given for securing performance to be enforced in case the party refuses to perform, the party will be compelled to do the act. If a man, for instance, give a bond to settle an estate, he must settle it; so if there be an agreement for a sale and an action for damages for breach of it would lie, still a specific performance will be decreed; when a man has agreed to do an act, he has no election, he cannot elect to pay the amount of his penalty and break his engagement. The general rule is laid down in *Howard v. Hopkyns* (*l*), and in the same way, if a man covenants to abstain from an act, it would seem to follow he must abstain, because he has agreed so to do" (*m*).

(*k*) 2 Ves. Sen. 528.
(*l*) 2 Atk. 371.

(*m*) *French v. Mascal*, 1 Conn. & Law, 465.

This general principle of equity is illustrated by the view which has of late been taken respecting the effect of equitable charges. An agreement to charge land with the payment of a sum of money, is to be satisfied only by payment of the money, and confers all the powers necessary for securing payment by means of the land.

If a man charges an estate with the payment of a sum of money from an early period, the practice of the Court has been to direct a sale. In *Shepherd v. Kent*, the plaintiffs exhibited their Bill in Chancery against executors who were also devisees, to be paid a debt of £8000 alleged to be due upon a note under the hand of their testator, whereby he agreed to charge certain lands with the payment of that money, but which he had not charged therewith: the Court decreed a sale of the lands and payment of the debt out of the produce (n).

The subject met with considerable attention in the case of *Metcalf v. the Archbishop of York*. A vicar, whilst the statute of Elizabeth against charging benefices was repealed, charged his living with an annuity, and covenanted, if he should exchange his living, to secure the annuity by charging and demising the new living, and that in the mean time it should be charged with the annuity. He came into possession of the new living, but before he had executed a legal demise the statute of Elizabeth was revived, and the legal deed was rendered invalid. On a bill filed to enforce this charge, it was urged by the defendant, before Sir L. Shadwell, V. C., and Lord Cottenham on appeal, that

(n) Colles, P. C. 253.

the whole doctrine of equitable charges rests on the right to specific performance, for a person having an equitable charge, has no estate or interest; that no action of covenant could be brought upon either branch of the covenant for the refusal to perform the covenant after the performance had become unlawful; that it was no breach of the covenant at law, and that where there has been no breach at law, there can be no specific performance in equity. Lord Cottenham, affirming the decision of the Vice Chancellor, held that the charge was valid and subsisting; that there was an equitable charge and a right to call for a legal charge; that the fact that the legal charge could not be made, could not affect the equitable charge. "It was said for the defendant," observed his Lordship, "that all equitable charges rest upon specific performance and the right to have a legal charge. This is by no means so. The equitable incumbrancer has totally different remedies. What right has an equitable mortgagee by a deposit of deeds to ask for a legal mortgage?" (o).

If in this case there had been no direction that, until the execution of the legal charge, the annuity should be charged on the living, it is probable that the covenant to make a legal charge would be considered to amount to an equitable charge. The argument for the defendant, therefore, could only have been supported, if there had been only the covenant to make the legal charge, and if that covenant had been originally illegal: but if an action had been brought

(o) 1 M. & C. 547.

upon the covenant, before the statute of Elizabeth was revived, damages would have been recovered; had the covenant been originally and always illegal, then the expressions of Lord Eldon, in *Prebble v. Baghurst* (*p*), that "unless there had been a breach of the bond at law, there could be no title in equity," might have applied.

The language of the Lord Chancellor, "What right has an equitable mortgagee by a deposit of deeds to ask for a legal mortgage?" seems at first sight at variance with the language used by other Judges on this subject. His Lordship had previously, in another case, referred to the commencement of the doctrine of equitable mortgages. He said, "In the cases of *Featherstone v. Fenwick*, in the year 1784, and *Harford v. Carpenter*, in the year 1785, both cited in *Russell v. Russell* (*q*), we find Lord Thurlow saying, that a deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated. In *Birch v. Ellames* (*r*), the Chief Baron of the Exchequer says, "A deposit of title deeds as security for a debt, is now settled to be evidence of an agreement to make a mortgage, and such agreement is to be carried into execution by the Court." The decree in that case was, that the defendant should pay, or stand foreclosed and convey. In *ex parte Wright* (*s*), Lord Eldon says, that a deposit of title deeds was evidence of an agreement for a mortgage, and that an equitable title to a mortgage was, in equity, as good as a legal mortgage. Such being the light in which Courts of

(*p*) 1 Sw. 313.

(*q*) 1 Bro. C. C. 269.

(*r*) 2 Anst. 428.

(*s*) 19 Ves. 255.

Equity view equitable mortgages by deposit of title deeds, it would seem to follow that the remedy to be afforded to such mortgagees should, as nearly as possible, correspond with that to which legal mortgagees are entitled; and, accordingly, from the search which I have directed to be made as to the form of decrees upon such subjects, I find that such has been the principle adopted (*t*).

This language seems inconsistent with the distinction afterwards laid down by the same high authority, between the rights of a legal and of an equitable mortgagee: but that distinction accords with the language and decision of Sir John Leach, in *Pain v. Smith*. In that case the plaintiff, an equitable mortgagee by deposit of title deeds, prayed for a sale of the estate. It was resisted on the ground that all the plaintiff could claim was a legal mortgage. The argument for the plaintiff was, that the Court had always directed a sale; and the case of *Russell v. Russell* was quoted. This, however, was no authority in the ordinary case, as the mortgagor had become bankrupt. The Master of the Rolls said, "If the contract between the plaintiff and the defendant had been, that the deeds should be deposited as a security until a legal mortgage could be prepared, there would be ground for the argument of the defendant; but there being here a general equitable charge upon the property, the plaintiff is entitled to a sale for satisfaction of that charge, and such has been the constant course of the Court, and the decree must be accordingly" (*u*).

(*t*) Per Lord Cottenham, M. R.,
2 M. & K. 419; see p. 421.

(*u*) 2 M. & K. 417-8.

This decree has been said, by high authority, to be manifestly wrong (*v*); but there are strong reasons in its favour, so far as it decreed a sale, though it cannot be supported in directing that sale to be immediate.

What, in equity, is the nature of the contract between the mortgagor and mortgagee? There is a debt and an agreement that the debt shall be satisfied by means of the estate pledged. But the ordinary remedy is foreclosure only, which is founded on the effect of a mortgage at law. The legal estate is forfeited by non-payment of the money at the time appointed; equity interposes to permit the mortgagor to redeem after the forfeiture; a decree of foreclosure is simply a bar to the mortgagor's equitable claim, and remits the mortgagee to his legal right.

This cannot but be considered as a narrow view of the subject, even where the mortgage is a legal one. Lord Erskine remarked the limited application in this instance of the doctrines of equity; he said, "that the Court, in one respect, does not act altogether up to its own principle in the case of a mortgage. What I mean, by presuming to say the Court has not acted up to its own principle, is this: that perhaps, instead of a foreclosure, a decree for sale of the estate would be more analogous to the relative situation of lender and borrower; and I am informed by Lord Redesdale, that such is the course in Ireland: a decree for sale instead of a foreclosure; and, if the sale produce more than the debt, the surplus goes to the mortgagor; if less,

(*v*) Per Sir L. Shadwell, V. C., *Brocklehurst v. Jessopp*, 7 Sim. 438.

the mortgagee has his remedy for the difference" (*w*). This was the doctrine of the Civil Law (*x*).

But however unwilling Courts of Equity have been to act upon their own principles in the case of a legal mortgage; they seem to have given full effect to them, if required, in the case of equitable mortgages. They have enforced specifically the contract for paying the debt by means of the particular estate charged. In an early case, upon a defective security, the Master of the Rolls said, it was often referred to the Master to set a valuation on the estate, and the plaintiff was to take it *pro tanto* (*y*). In this case of *Dashwood v. Bithazey*, a case of *Nosworthy v. Maynard* was mentioned, where the security being defective, the cause stood over, and the plaintiffs filed a supplemental bill, and prayed a sale. The practice seems to have been adopted in *Smith v. Nelson* (*z*), *Meux v. Ferne* (*a*), and *Spring v. Allen* (*b*).

Some of the cases of sales being decreed at the suit of an equitable mortgagee, such as *Russell v. Russell* (*c*), are where the mortgagor had become bankrupt; and others, as *Brocklehurst v. Jessopp* (*d*), and *Thorpe v. Gartside* (*e*), where he had died before the filing of the bill, these of course do not establish the general rule.

But the decree made by Lord Langdale, M. R., in

(*w*) *Perry v. Barker*, 13 Ves. 198.

(*x*) See *Powell's Law of Mortgages*, edited by Coventry, II. 961, n.

(*y*) Mos. 196.

(*z*) *Seton's Forms of Decrees*, p. 180.

(*a*) 5th Feb. 1818; see 2 M. & K. 422.

(*b*) 12th Feb. 1830; see 2 M. & K. 422.

(*c*) 1 B. C. C. 269.

(*d*) 7 Sim. 438.

(*e*) 2 You. & C. 730; see also *Greenwood v. Firth*, 2 Hare, 241, n.

Meller v. Wood (*f*), which directed six months' time to be allowed to an equitable mortgagor, and in default of payment in that time, the estate to be sold, was made by his Lordship after consultation with Lord Cottenham. *Keys v. Williams* (*g*) is to the same effect, and although the decisions with regard to the right of an equitable mortgagee are not uniform (*h*); yet it seems established that he is entitled to a sale, unless his rights are limited by an agreement that he is only to be entitled to a legal mortgage (*i*).

And it may be questioned, whether a legal mortgagee is not entitled, upon the implied agreement in the mortgage to have the debt discharged out of the land, to ask for a sale, and whether, at the present time, the Courts would not grant such a prayer.

(*f*) 1 Keen. 16. This was a mortgage of a leasehold interest: as to the remedies of a mortgagee of chattels; see *Dyson v. Morris*, 1 Hare, p. 422; *Slade v. Rigg*, 3 Hare, 35.

(*g*) 3 You. & C. 55.

(*h*) Per Sir J. Wigram, V. C., in *Lister v. Turner*, 5 Hare, 281;

see p. 293. In *Perry v. Keane*, Coote on Mortgages, 2nd ed. 713, the defendant contended that the plaintiff, an equitable mortgagee, was only entitled to a sale, and not to a foreclosure, but a foreclosure was decreed.

(*i*) *Hiern v. Mill*, 13 Ves. 114.

CHAPTER II.

If the Contract has been substantially executed, the form of its execution is immaterial.

IF the party, bound by agreement, to do certain acts, has done acts which are equivalent to a performance, or are intended by him to be taken in satisfaction, of the obligation, this state of things amounts to an answer to a bill for specific performance.

In the case of *Chapman v. Dalton* (a) at law, it was said, agreements may be said to be performed when the intent is performed, though it be not according to the words.

The distinction between performance and satisfaction is, that the former is the performance in specie of the agreement; the latter is where the contracting party has done something in lieu of the thing contracted for. Performance is a question of fact: satisfaction is not only a question of fact, but also a question of intention. The distinction has been generally admitted as one of importance; the question in cases of performance is, whether the agreement entered into has been performed; the question in cases of satisfaction is, whether the obligation was intended to be, and ought to be deemed satisfied by the acts. Lord Thurlow in one of his reported judgments, seems to have

(a) Vin. Ab. 5. 510.

considered, that the question of intention was to be entertained in both cases. In *Rickman v. Morgan*, he said, "This proviso seems to get rid of the cases upon the head of satisfaction, which have been decided upon the head of intention; as when a man has contracted to pay to A., on his death, a certain sum, and he does an act in discharge of that obligation, many questions have arisen, how far it was his intention to exercise his benevolence, or to apply himself in discharge of the contract. In support of the argument from the circumstances of intention, the burthen of proof must lie upon those who would discharge themselves of the obligation, because such a gift is a bounty *primâ facie*, and cannot be turned round but by strong circumstances of a contrary intention, as in the case of a bond debt. I also lay out of the question cases of performance; they ultimately turn upon the head of intention: for if a man has done that which is apparently tantamount to what he covenanted to do, yet if he did not intend it as equivalent, or in performance, it would be idle for the Court to say, he meant it as such: therefore I have been at a great loss to make a broad and useful distinction between satisfaction and performance, because of the intention of the testator: it is consequently a performance, and if that is the very thing contracted to be done, it is a proof that the party under the obligation has done it in conformity to such obligation, and [it] is then to be deemed a performance, because there is no doubt of it" (b). This doctrine is undoubtedly

(b) 2 B. C. C. 395 ; see Vin. Ab. 5. 506.

correct, but the distinction between performance and satisfaction is of great importance; because the *onus probandi* as to the intention lies on different parties in the two cases. In the case of satisfaction, that is, something which neither at law nor in equity is an actual performance of the contract; unless it is presumed from circumstances, or proved that the intention was that the benefit should be taken in satisfaction of the obligation, it will not be assumed. In the case of actual performance at law or in equity, unless it be proved and properly deduced from circumstances, that it was not intended to be in performance, it will be assumed that it was so done. Lord Thurlow seems only to argue that proof of intention is admissible in both cases; and, indeed, in another case (*c*), he acted upon this distinction, and excluded the question of intention in a case of performance: he says, "[the husband] having contracted to leave [the wife] her a sum of money, and having actually left it, the question is, whether he has not performed his covenant, although he might possibly mean to do a different thing" (*d*).

"In *Lee v. Cox and D'Aranda*," (*e*) said Lord Alvanley, "and the other cases where a person covenanting to leave a sum of money has not done so; but has left his property to descend, so that an equal

(*c*) *Haynes v. Mico*; 1 B. C. C. 131.

(*d*) Another distinction is made by Mr. Cox, that satisfaction implies the doing of something equivalent, and therefore a part-satis-

faction will never be presumed, although a part-performance will be. See note to *Blandy v. Widmore*, 1 P. W. 324.

(*e*) 3 Atk. 419.

or greater sum would go according to the covenant. Lord Hardwicke held it not a satisfaction, and rightly. This [case] cannot be held a performance: there is a different time of commencement. If it is not a performance, can this Court, according to the rules, construe it as intended as a satisfaction? for it is a question of intention" (*f*). It is to be remembered that the question, whether there was a performance or not, being decided, the rights of the party are decided; whilst, on the other hand, the utmost effect of an intended satisfaction by will, that cannot be considered a performance, will be to raise a case of election.

The cases of *Blandy v. Widmore*, and *Lee v. Cox* and *D'Aranda*, are generally considered as authorities upon this question. In both cases the husband covenanted to leave a certain sum to the wife, and died without a will; but the widow's share, under the Statute of Distributions, amounted to a larger sum. The Court, in both cases, held that this was a performance of the covenant. Lord Kenyon thought there was a legal performance of the covenant. Lord Eldon thought that the covenant must be considered in a different light from an ordinary obligation. He says, "Those cases are distinct authorities, that where a husband covenants to leave, or to pay at his death, a sum of money to a person, who, independent of that engagement, by the relation between them and the provision of the law attaching upon it, will take a provision; the covenant is to be construed with reference to that;

(*f*) *Richardson v. Elphinstone*, 2 Ves. jun. 463.

and the Court will not look upon the slight difference between leaving and paying, or whether payment is to be within three months or six months" (*g*).

Lord Hardwicke states, that where a party to a deed is obliged to do a particular thing for the benefit of another, and he does a thing equally satisfactory, the intent of the original obligation being answered, the Court will presume a satisfaction by implication (*h*); but this is, in fact, performance in equity of the obligation. So a legacy will not satisfy a debt, unless from its perfect equality, it is equivalent to a payment of the debt (*i*).

In the case of a parent bound to pay a portion for a child by settlement, it is decided that a little difference between a portion and a legacy as to the time of payment, shall not prevail against the presumption of an intended satisfaction (*j*).

This is founded on the principle of the Civil Law, which has been adopted by the law of England; that where a legacy is given by a parent to a child, it is deemed a portion, and therefore carries with it these qualities, that it is a deliberate distribution among his children of such portions, as he thinks fit. If therefore, the child has already a portion provided for it, either by settlement on the father's marriage, or by advancement by the parent, that is to be taken as part of the portion (*k*). Courts of Equity lean against double portions not in favour of the eldest son, but for the family,

(*g*) *Garthshore v. Chalie*, 10 Ves. 1; see *Rhodes v. Rhodes*, 1 Ves. jun. 97.

(*h*) *Weyland v. Weyland*, 2 Atk. 632.

(*i*) Per Lord Alvanley, 3 Ves.

529; *Chauncey's case*, 1 P. W. 408, and Mr. Cox's note.

(*j*) *Barclay v. Wainwright*, 3 Ves. 462.

(*k*) *Ellison v. Cookson*, 1 Ves. jun. 100.

and to preserve the estate in as ample a condition as the provisions will admit, for the benefit of all claiming under the limitations of the estate (*l*). Sir William Grant, in *Wetherby v. Dixon*, states the doctrine in this way, "I know of no general rule that a second gift must be understood to be a substitution for a former one, and not in addition to it; but it has been reasonably enough presumed, that a man does not mean to pay twice the same debt; and Judges in equity have been in the habit of giving the name of debt to a portion given by a father to a child (not, perhaps, with great propriety in a country, where there is no claim to anything in the nature of legitim), and thence a presumption has been raised against the intention of the father to give two portions."

When it comes to be a question between parent and child, small circumstances which, with regard to third persons, would be sufficient to repel the presumption, have not that force (*n*). A gift of a rent-charge by deed, was held to amount to satisfaction of a pecuniary legacy given by will (*o*). Sir William Grant held a bequest of a share in powder works, to be made up in value £10,000, to be a satisfaction of a portion of £2000 (*p*). The doctrine as to children is the same, where the provision for the child arises not from a

(*l*) Per Lord Commissioner Eyre, *Blake v. Bunbury*, 1 Ves. jun. 514; see also *Finch v. Finch*, 1 Ves. jun. 534.

(*n*) *Sparkes v. Cator*, 3 Ves. 535; *Monck v. Lord Monck*, 1 B. & B. 29; *Hinchcliffe v. Hinchcliffe*, 3 Ves. 527; see *Wood v. Briant*, 2 Atk. 521; *Seed v. Bradford*, 1 Ves. Sen. 501; *Chave v. Farrant*, 18 Ves. 8; *Drewe v. Bidgood*, 2 S. &

S. 424; and compare *Hayes v. Gaury*, 2 J. & L. 280.

(*o*) *Williams v. Duke of Bolton*, 1 Dick. 405, 4 Dr. & W. 225 (*n*); see *Walcot v. Bloomfield*, 4 Dr. & W. 211.

(*p*) *Bengough v. Walker*, 15 Ves. 507; *Yates v. Lewin*, Colles, P. C. 172; *Fourdrin v. Gowdey*, 3 M. & K. 409.

settlement made on the marriage of the parent, but in a settlement made by the parent, at the marriage of the child. "The rule of the Court," says Sir John Leach, M. R., "is, as, in reason, I think it ought to be, that if a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *prima facie*, to be presumed that he does not mean a double provision; but this presumption may be repelled or fortified by intrinsic evidence, derived from the nature of the two provisions, or by extrinsic evidence" (q), and this holds in case of a person placing himself in *loco parentis* to a child (r).

The rule is different in the case of a wife. In three cases her claim was allowed, and Lord Alvanley, in deciding a fourth in her favour, after referring to them, said, "I am not to be understood to go upon cases of provisions for children; for they stand upon a different ground. These three cases are nearly upon the same footing as the case of a bond debt due to a stranger" (s).

In a late case, it was held by Sir E. Sugden, L. C. I., there being a covenant that the wife should have half of the real or personal property the husband died possessed of, that she was not entitled to dower, nor to a

(q) *Weall v. Rice*, 2 R. & M. 267, and following cases. Sir E. Sugden, L. C. I., denied that the admission of extrinsic evidence was right. *Hall v. Hill*, 1 C. & L. 154; but parol evidence is always admitted to rebut a presumption of law arising under a written instrument, although not in opposi-

tion to the literal effect of the instrument itself.

(r) *Booker v. Allen*, 2 R. & M. 270; *Powys v. Mansfield*, 3 M. & Cr. 359; *Pym v. Lockyer*, 5 M. & Cr. 29.

(s) *Richardson v. Elphinstone*, 2 Ves. jun. 464.

distributive share of the personalty (*t*). In *Goldsmid v. Goldsmid*, the husband covenanted to pay a fixed sum to the widow, and left his property to be distributed at the discretion of the executors, they disclaimed; the widow claimed under the covenant and under the statute, Sir Thomas Plumer said, "The rule is clearly this: that the distributive share of the widow, in the case of absolute intestacy, is considered as performance of a covenant by which the husband had undertaken, that she should receive a fixed sum at his death, provided that her share is equal to the sum. I state that the question is at rest; because I consider that the rule conclusively established by the case of *Blandy v. Widmore* (*u*), in which the judgment of Sir John Trevor was affirmed, and, on a rehearing, re-affirmed by Lord Cowper. More than a century has since elapsed, and the subject has been frequently under the review of the most distinguished Judges, of Lord Hardwicke, Lord Thurlow, Lord Alvanley, and the present Lord Chancellor [Eldon] * * ; and, though the subsequent authorities of Haynes and Mico (*v*), and Devese and Pontet (*w*), have decided that, in the case of testacy, what was given should not operate as performance or satisfaction of what was due, those decisions, grounded on particular circumstances, are so far from impeaching the rule, that they expressly recognise it. The only question now is, whether a distinction can be made in the present case." His

(*t*) *Hamilton v. Jackson*, 2 J. & L. 295.

(*u*) *Ubi sup.*

(*v*) 1 Bro. C. C. 129.

(*w*) *Proc. in Chancery*, ed. Finch, p. 240, n. ; 1 Cox, 188.

Honor said, "the principle of the decisions was that of performance, that the widow obtained that for which she contracted. If she has received the sum stipulated, and at the time stipulated, namely, on the death of her husband, from his assets, the contract is performed;" and his Honor considered the case before him was a performance of the contract, and decreed accordingly (x).

It is an important question, when from the differences in the time or certainty of payment, the case is not one of performance, but can only be one of satisfaction, whether an obligation in favour of any but children, can be presumed as satisfied by a legacy. Lord Eldon (y) thought it impossible to state a slighter difference than that upon which Lord Thurlow relied in *Haynes v. Mico*, and seemed hardly to be satisfied with Lord Kenyon's decision, in *Devese v. Pontet*. But the doctrine of Lord Alvanley undoubtedly was, that unless the bounty to a wife, (and of course the principle applies more strongly to the case of a stranger), amounted to a performance of the contract, it could not be held a satisfaction, for that would be to raise an implication, which the law did not raise in the case of a wife (z).

In *Hales v. Darell*, Lord Langdale, M. R., held that the question was not whether the covenants, into which the testator had entered in favour of his sisters for valuable consideration, had been performed by his will, but whether these were intended to be, and ought

(x) *Goldsmid v. Goldsmid*, 1 Sw. 211. The cases are collected in Mr. Swanston's note.

(y) 10 Ves. 14.
(z) *Richardson v. Elphinstone*, 2 Ves. Jun. 414.

to be deemed satisfied by the provisions contained in it. His Lordship said, "The question, therefore, appears to me to be a question of satisfaction; and although there are, unfortunately, inconsistent authorities which seem applicable to this subject, it sufficiently appears, that *primâ facie*, the testator must be taken to have intended bounty, and that gifts, even more than equivalent in beneficial interest to satisfy the obligations, are not to be deemed satisfaction, if there are circumstances, even slight circumstances, which lead to a different conclusion:" (a) his Lordship decided the case on the language of the will; and, it is submitted, that upon the authorities as to an obligation in favour of a third party, if the provision by will does not amount to a performance, it is for the party, setting up an intention of satisfaction to prove it, for it will not be presumed.

In *Lang v. Lang*, the husband engaged on marriage to settle £4000 on the wife and the issue of the marriage. Sir L. Shadwell, V. C., thought the wife might have filed a bill in her husband's lifetime to compel him to invest the money, and declared the wife entitled (there being no children) to the £4000, and also to her distributive share under the husband's intestacy. There was here no performance of the covenant, and his Honor distinguished this case from that of *Lee v. Cox* and *D'Aranda* (b).

The doctrine of satisfaction, however, cannot be applied even to the case of a child, when there is no similarity, as in that case there must be uncertainty as to the intention.

(a) 3 Beav. 324, see pp. 331-2.

(b) 8 Sim. 465.

Lord Hardwicke says, "The thing given in satisfaction must be of the same nature and attended with the same certainty as the thing in lieu of which it is given; and land is not to be taken in satisfaction for money; nor money for land" (c). Sir Wm. Grant says, "The cases were all cases in which the testator, without reference to the pecuniary value of the thing he was giving, has given it; and the question was, whether, as upon entering into a computation of the value of the thing given, it turned out equal to the portion or the legacy, it should be taken as a satisfaction? The testator not having indicated any idea of his own, whether it was or was not correspondent in value to the debt which he owed, or the legacy he gave" (d). In the cases of *Devese v. Pontet* and *Barrett v. Beekford*, bequests of residue to a wife were held not to be satisfaction of covenants to leave money, and Sir Wm. Grant distinguishes between these cases, as debts, and that of a portion, and says, that neither Lord Hardwicke nor Lord Rosslyn say, that under no given circumstances could a residue be a satisfaction of a portion (e). Lord Langdale, M. R., decided, in a late case, that a bequest of a residue was a satisfaction of a portion. He said, if a moiety of the residue exceeded the value of the stock secured by the bond of the testator on the marriage of his daughter, and if there be nothing so far inconsistent between the limitations of the stock secured by the bond, and the limitations of the share of the residue given by the

(c) *Bellasis v. Uthwatt*, 1 Atk. Ves. 513.
426.

(d) *Bengough v. Walker*, 15 (e) *Bengough v. Walker*, *ubi supra*.

will, as to rebut the presumption against double portions, he was of opinion, that the daughter was not entitled both to the stock and to the share of residue. His Lordship grounded his judgment on the language of Lord Thurlow, in *Rickman v. Morgan* (*f*), where, however, the clauses in the settlement were of a peculiar kind (*g*). Lord Langdale said, that the bequest of the residue to an ordinary creditor would not be a satisfaction, but that portions provided by husbands for their wives, are subject to other considerations (*h*). But Sir Wm. Grant expressly states, that the case of a wife is the case of a debtor, and puts it upon the same footing: and the doctrine still remains unimpeached, that in case of a stranger or a wife, nothing but a performance of the obligation will be held a satisfaction, without any evidence that it was so intended (*i*).

If a party under an obligation to do a certain act, do something which is a necessary step towards the act, the Court will presume that he did it with the intention of performing this obligation.

If a man agree to purchase and settle lands, and he purchases lands, but does not settle them, and allows them to descend to his heir, they will be considered to have been purchased in pursuance of his agreement.

In *Lechmere v. Lechmere*, Lord Talbot, C., reversed the decision of the Master of the Rolls, who would not allow that estates of smaller value than the money agreed to be laid out, could be in part satisfaction. Lord Talbot held, it must be presumed the estates

(*f*) 2 Bro. C. C. 396.

(*g*) *Earl of Glengal v. Barnard*,
1 Keen, 769.

(*h*) See p. 789.

(*i*) *Eyre v. Green*, 10 Jur. 384;
Grigby v. Powell, 5 Sim. 290, 3 Cl.
& Fin. 103; see *Drewe v. Bid-*
good, 2 S. & St. 424.

were purchased in satisfaction of the covenant (*j*). In *Sowden v. Sowden*, the same doctrine was followed by the Master of the Rolls; there a party covenanting to pay the trustees of his marriage settlement a sum of money to be laid out in land, purchased land. The Master of the Rolls (Lord Kenyon), thought that *Lechmere v. Lechmere* decided the case. He conceived the principle established to be that, "where a man is bound to do an act, and he does what may enable him to do the act, it shall be taken to have been done by him, with the view of doing that which he was bound to do" (*k*). *Tubbs v. Broadwood*, was but in confirmation of the same doctrine; there the obligation was not created by covenant, but under a private act of Parliament, which gave power to a tenant for life to sell the settled estates. Lord Brougham, C., said, "It may be true, that this is the first time in which the doctrine of *Lechmere v. Lechmere* has been carried beyond the case of covenant; but the principle of that case is directly applicable to the present. The whole doctrine proceeds upon the ground, that a person is to be presumed to do that which he is bound to do; and if he has done anything, that he has done it in pursuance of his obligation" (*l*).

So again a trustee under an obligation to buy lands with the trust money, and buying lands, would be held to do it in performance of his obligation. But this is only where there is a distinct obligation and no contrary intention; it can have no effect against third parties; and if the trustee commits a breach of trust, there is no lien for the debt: the application of

(*j*) *Cas. t. Talbot*, 80, 3 P. W. 211.

(*k*) 1 Bro. C. C. 582.
(*l*) 2 R. & M. 487.

trust money in a manner which is a breach of trust, removes the presumption. The general rule is, that if the trustee for the purchase of land, to be settled to particular uses, makes a purchase, the intention shall be presumed; but if the trustee appears not to have intended to execute his trust, making the purchase altogether with a different view, the claim of the *cestui que trust* cannot be supported (*m*).

In *Attorney General v. Whorwood*, the position was laid down with the sanction of Lord Hardwicke, that where a man is under covenant so to settle lands, or to purchase and settle, if he leaves lands in their nature proper (for a reversion will not do), which were his former estate and descend after his death, or if he purchases and does not settle, it will be considered (unless evidence to the contrary), *pro tanto*, or in the whole, a performance of the covenant, and purchased with that view; not on the head of satisfaction, but performance (*n*).

So again, in *Deacon v. Smith* (*o*), Lord Hardwicke held the same doctrine, and referred to *Roundell v. Breary* (*p*), with approbation. In this case Breary, on the marriage of his son, covenanted for himself, his executors and administrators, within one month after the marriage, to settle lands to certain uses; the Lord Keeper thought the covenant created a lien upon the land, of which Breary, at the end of the month was seised; but this case has been put upon the circumstance, that a certain time was named for the performance of the covenant.

(*m*) *Perry v. Phelps*, 4 Ves. 108., 17 Ves. 173; *Lench v. Lench*, 10 Ves. 511; *Paxton v. Cox*, 17 Ves. 329.

(*n*) 1 Ves. Sen. 539; see p. 281, *supra*.

(*o*) 3 Atk. 323.

(*p*) 2 Vern. 482.

On the other hand, there are cases of an opposite tendency. In *Freemoult v. Dedire*, a party covenanted to settle lands of £60 a year on his wife. Lord Macclesfield held, that none of the lands he had at the time of making this covenant were bound, and that this was but an ordinary debt (*q*). In *Williams v. Lucas* (*r*), an agreement to give a security by way of mortgage of lands when required, was held not to give a lien upon the land of which the debtor was seised, but this was obviously decided upon the special terms of the contract requiring the real security to be asked for. So in *Gardner v. the Marquis Townshend* (*s*), a person covenanting to settle lands, and acquiring afterwards lands not by purchase, the lands were not bound; the Court said that a purchaser could alone be presumed to have purchased lands to perform a covenant which he had entered into, to settle lands. Lord Hardwicke thought, that selling the land would be the indication of a different intention, and upon the same principle devising the lands by will, would be evidence of a different intention (*t*); but the question is, as to the intention at the time of the purchase, and whether subsequent events could alter the consequences of that intention (*u*). So in *Pitt v. Jackson* (*v*), and *Ravenshaw v. Hollier* (*w*), it was said, that upon a general covenant, the man had his whole life to perform

(*q*) 1 P. W. 429.

(*r*) 2 Cox, 160.

(*s*) Cooper, 301.

(*t*) *Deacon v. Smith*, 3 Atk. 327, cf.; *Tooke v. Hastings*, 2 Vern. 97.

(*u*) *Lechmere v. Lechmere*, Ca. t. T. 80, see p. 92.

(*v*) 2 Bro. C. C. 51.

(*w*) 7 Sim. 3. The Vice Chancellor held that a covenant to pay an annuity out of the rents of the covenantor's estate, charged the annuity on the estates of which he was then seised. The case of *Berrington v. Evans*, 3 Y. & C. 384, seems not decided conformably to this decision.

it, and therefore there was no lien upon land acquired during his life.

Lord Eldon's remarks upon this subject are full of importance: "It is now settled, whatever may have been Lord Thurlow's difficulty, that, if there is a covenant to purchase and settle lands upon the first and other sons in tail male, and the party purchases land of less, equal, or greater value than the sum he covenanted to lay out, taking a conveyance to him and his heirs, and dies, leaving a son, who would be tenant in tail under the settlement, and a grand-daughter by an elder son, deceased, upon whom no settlement being made, the lands descend, that purchase would be, not in all senses a performance, but a sort of mixed case between performance and satisfaction, that would bar any demand against the assets of the grandfather. The case of *Sowden v. Sowden* (x), proves that beyond all controversy. The father there under the covenant to lay out £2000, had no intercourse with the trustees upon the purchase he made for £2150. He advanced nothing to them. They therefore laid out nothing. But taking to himself that purchase, so made with more money than he had covenanted to lay out, he permitted it to descend; and Lord Kenyon said, it was much too late to argue it; and was clearly of opinion, that the purchase must be taken to be in performance of the covenant; or, as he expresses it, an act done towards performance of it. It would have been satisfactory, if Lord Kenyon had considered Lord Thurlow's difficulty. Upon the principle of Lord Kenyon's

(x) *Ubi supra*.

decision, it is very difficult to say, that, when once you have marked that act, as done towards performance of the covenant, you could permit the effect to be done away by any subsequent accidents. It would therefore impose upon the grand-daughter, the necessity of parting with the estates descended upon her, unless *præsumptis juris et de jure* could be raised, or it could be made out by evidence, that it was not an act done towards performance. In a case (*y*) intermediate between *Wilcocks v. Wilcocks*, and *Sowden v. Sowden*, it is said truly, a man cannot buy all the land, covenanted to be bought, at once; also, that he cannot find land precisely of that value. These circumstances therefore do not tell much. But in the expressions of the Judges we cannot find to what extent they feel that they must press the consequences of their opinion in all the circumstances that might occur between different branches of the family" (*z*).

It is clear from Lord Eldon's language, that an estate so bought would be subject to the trust, and if so, that it would be bound by the trust after the death of the party buying against creditors, either simple contract or specialty: and the only question is, whether the party buying, is at liberty at any time afterwards to declare it was not his intention to perform his covenant.

The dictum in *Tooke v. Hastings* (*a*) is, that a devise of the lands purchased will not be considered proof of

(*y*) *Lechmere v. The Earl of Carlisle, ubi supra.* 10.

(*z*) *Garthshore v. Chalie*, 10 Ves.

(*a*) 2 Vernon, 97.

the purchase having been made with a different intention, than that of performing the covenant. It is hardly possible to reconcile this with the expression attributed to Lord Hardwicke (*b*), that mortgaging or selling would be evidence of a different intention. But the decision in *Tooke v. Hastings*, was only that the covenant being to charge an annuity on lands, and there being a mere devise of the lands when bought, the annuity was charged: unless there had been words in the devise to shew that the testator wished the lands to be held free, the dictum is by no means fully supported by the decision.

If the dictum in *Tooke v. Hastings*, is to be maintained, it must be upheld on the ground, that if the lands were originally purchased with the intention of performing the covenant, the covenantor has no right to alter the destination of the lands, and Lord Hardwicke's exception as to persons buying the lands, can only be an expression of the fact, that a purchaser or mortgagee would be protected by reason of his valuable consideration, if he had no notice.

The question then would depend on the circumstances under which the Court would presume in the absence of evidence, that the covenantor purchased with the view of performing his covenant, and the sound rule seems to be, that whenever there is a breach of his covenant at law, or a right to enforce it in equity, and when after that time lands are found which have been purchased by the covenantor, the Court will presume that he meant to perform his covenant, and attach a lien on the lands. If, therefore, the covenant is to pur-

(*b*) *Deacon v. Smith*, 3 Atk. 323.

chase and settle at any time during his life, the breach can only take place at his death, and until that time, no Bill to enforce the covenant against particular lands will lie (c). If there is a covenant to purchase and settle on a specified day, then any purchase after that time will be considered to be in performance, and a Bill to affect those lands will lie (d).

There seems also to be a leaning of the Judges before whom the case of *Wellesley v. Wellesley* (e), was argued, to the doctrine, that if a man covenants to settle lands on a particular day, and if on that day he is in possession of lands however acquired proper for that purpose, a bill to affect those lands will lie, even although he had an option as to the mode of satisfying the covenant. But this can hardly be put higher than a power in the Court, to compel him to perform his covenant, and to restrain him from parting with the lands which he has acquired, until he does perform the covenant, and it may be a question whether assuming this equity to be established, notice of such a covenant would bind a purchaser or mortgagee of the lands (f).

In the case of the covenantor purchasing the lands, if the intention is presumed, it amounts to a part performance, and would bind a purchaser with notice (g).

(c) *Prebble v. Boghurst*, 1 Sw. 309; *Wellesley v. Wellesley*, 10 Sim. 256.

(d) *Roundell v. Breary*, 2 Ver. 482; *Ex parte Poole, In re Symes*, 11 Jur. 1005; *Wellesley v. Wellesley*, 10 Sim. 256, 4 M. & C. 561.

(e) *Ubi sup.*

(f) *Martin v. Martin*, 2 R. & M. 507.

(g) See obs. of Lord Cottenham, C. in *Wellesley v. Wellesley*, 4 M. & C., 561, see p. 577.

CHAPTER III.

The Court will not materially vary the real terms of the Contract.

IN decreeing the performance of contracts, the doctrine of a Court of Equity is not forfeiture—but compensation (a); but this doctrine is not to be extended beyond its fair and proper limits. The agreement between the parties is substantially to be performed, and Courts of Equity have no more jurisdiction than Courts of Law, to vary the express agreement between the parties.

Accordingly equity will not interfere, unless it can secure substantially what each party contracted for: If a vendor during the negotiation of a purchase, materially alters the nature of the property, as by cutting down ornamental trees, and committing equitable waste; he cannot compel a specific performance in equity, any more than he can recover in an action at law; but if the injury done, is one completely to be compensated by an abatement of the purchase money, it will not in equity, although it will at law be a bar to his claim.

The general doctrine is, that a Court of Equity will

(a) Per Sir J. Leach, *M. R. Page v. Broom*, 4 Russ. 19.

not allow the strict letter of the law to prevail, when the agreement in equity ought to be performed. At law and in equity, a creditor having entered into an agreement for a composition, is not bound to take less than his debt, unless that agreement shall be absolutely and strictly fulfilled (*a*). In a case, however, before Lord Eldon, it having been agreed that the creditors should accept of five notes for the sum agreed to be paid for their debts; and the defendant, having received four notes, but the fifth, which was to be indorsed by a security, not being delivered; the defendant brought an action upon his original debt, alleging that the fifth note had not been delivered. Lord Eldon granted an injunction, restraining execution to the amount of the notes due, saying, "The justice due to the other creditors requires the interposition of a Court of Equity to relieve against an action, which, except upon equitable principles, could not be resisted" (*b*).

Where a party has entered into a contract for the sale of more property than he has, the purchaser, if he thinks fit to accept that which it is in the power of the vendor to give, is entitled to a performance to that extent (*c*).

The principle is, that although it is clear that a Court of Equity ought not to decree a specific performance, unless the condition of mutuality is complied with; that is, where both parties had by the agreement a right to compel a specific performance

(*a*) *Ex parte Sadler v. Jackson*,
15 Ves. 58; *Lee v. Lockhart*, 3 M.
& C., 302.

Ves. 372.

(*c*) *Graham v. Oliver*, 3 Beav.
124, see p. 128.

(*b*) *McKenzie v. McKenzie*, 16

according to the advantage which they were to derive from it (*d*); yet this is not to be used as an answer to a fair demand, when the contract is made respecting a matter within the knowledge of the one party, but not of the other. If an agreement is made for the sale of an estate, the vendor cannot compel the purchaser to take the estate, unless the title be sound; but if the purchaser chooses to take such a title as the vendor can give him, the vendor cannot object that he could not have forced such a title upon him. The vendor must have known the circumstances of the case, and is bound to fulfil his engagement (*e*).

In *Thomas v. Dering* (*f*), Lord Langdale, M. R., considered the contract made by Sir Edward Dering with Mr. Thomas, as binding upon Sir Edward, but not upon the trustees of his estate. The interest which Sir Edward could give in the property, without the consent of the trustees, was only his own life estate. "There are certainly," said his Lordship, "authorities to shew that this Court has jurisdiction to compel a vendor, who has misrepresented the extent of his interest, to convey that which he really has, and to make a corresponding abatement of the purchase money:" citing the observations of Lord Eldon, in *Mortlock v. Buller* (*g*), and *Milligan v. Cooke* (*h*). "But the statement," added his Lordship, "we have of the cases, in which the jurisdiction has been asserted, shews that there are great difficulties in acting upon it, in cases which are not very simple * * *. It is

(*d*) Per Lord Redesdale, *Lawrenson v. Butler*, 1 S. & Lef. 13, see p. 18.

(*e*) *Wood v. Griffith*, 1 Wilson,

Ch. Ca. 44.

(*f*) 1 Keen, 729.

(*g*) 10 Ves. 315.

(*h*) 16 Ves. 1.

impossible not to see, that the *cy prés* execution of the contract which is given in these cases, is in fact the execution of a new contract, which the parties did not enter into, in which there is no mutuality, and in which there are no adequate means of ascertaining the just price * * *. I therefore apprehend it to be clear, that the Court will 'not, in all cases, afford the sort of relief which is here asked." He cited the opinion of Lord Redesdale, in *Harnett v. Yielding* (i), who said, "that the vendor would only be compellable to give such title as he had, in cases where an injury would be sustained by the plaintiff, in case he were not to get such an execution of the agreement as the defendant can give." His Lordship ultimately dismissed the bill, on the ground that the sale of Sir Edward's interest alone might be prejudicial to other parties.

But Sir E. Sugden seems to throw great doubt upon the propriety of this decision: he says, "That such cases, where the settlement is concealed, deserve no favour, for there is no mutuality, the trustees, by their election, may force the purchaser to complete, although he cannot compel them to join" (j).

If, however, the party has entered into the contract under a mistake as to his power, that may be an answer to a bill for specific performance (k).

Where there is a mere mistake as to the nature and extent of the subject, as of the acres in a landed estate, this jurisdiction seems to be readily applicable (l). But this kind of compensation cannot be insisted on even

(i) 2 Sch. & Lef. 553.

(j) V. & P. 351.

(k) See *Mortlock v. Buller*, 10

Ves. 392.

(l) *Hill v. Buckley*, 17 Ves. 394.

by the purchaser, where a large portion of the estate cannot be conveyed (*m*).

The Court will not compel a purchaser to take an indemnity, nor the vendor to give it (*n*).

The principles adopted by a Court of Equity as to compensation, are very distinctly shown by examining the cases in which relief is given against a breach of covenant in a lease. The doctrine of equity is, that if the actual agreement between the parties is performed, the Court will restrain the one party from taking any proceedings at law on account of a breach. It is obvious, that this is in the nature of a specific performance: if the agreement in the consideration of a Court of Equity has been substantially performed, the parties ought to be content.

It has been uniformly the doctrine of these Courts, that by the payment of interest, the party is put in just the same state, as if the principal had been paid at the time stipulated; though, as Lord Eldon remarks, the failure of payment at the time may be attended with mischievous consequences, that never can be cured in a rational sense by subsequent payment with interest. This doctrine, Lord Eldon never approved of, and he never extended its application (*o*). Time is of importance in the payment of money in the case of insurance covenants and compositions with creditors (*p*). And the payment of money is enforced by forfeiture, in the case of public companies and con-

(*m*) *Wheatley v. Slade*, 4 Sim. 126; but see *Observations of Sir E. Sugden, V. & P.* 359.

(*n*) *Balmano v. Lumley*, 1 V. & B. 225; *Aylett v. Ashton*, 1 M. & C. 114; *Paton v. Brebner*, 1

Bligh, 66.

(*o*) 18 Ves. 59, 60.

(*p*) *Tasker v. Brocas*, 5 Vin. Ab. 513, as to compositions, *Rose v. Rose*, Amb. 332.

tractors with Government; Sir Wm. Grant observed, that interest is not an adequate compensation even among individuals, much less in these undertakings (*q*).

Sir John Leach, in *Davis v. Thomas* (*r*), shews the limits to which Courts of Equity confine themselves, as to the effects of non-payment of money. "In all cases of the payment of money, where penalty or forfeiture is introduced for the purpose of security, there a Court of Equity will relieve against the penalty or forfeiture, upon the ground of full compensation by giving interest. But where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming that privilege, must shew that the money was paid; accordingly, as in a case of interest reserved on a loan of five per cent., with a proviso, that four per cent. will be accepted, if paid within a limited time after it becomes due, or in the case of the covenant for the renewal of a lease on the payment of a certain fine at a stated period. Here it is admitted, that the rent was not duly paid at the stipulated times, and no fraud, surprise or accident is alleged, and the plaintiff therefore is not entitled to the repurchase which he claims."

In all cases of breaches of covenant, except non-payment of money, where there has been a forfeiture, the Court will not give relief merely upon an adequate compensation being offered, because it could not have been the real meaning of the parties that compensation should have been given.

(*q*) *Sparks v. The Liverpool Waterworks Company*, 13 Ves. 428.

(*r*) 1 R. & M. 508.

The first case is *Wadman v. Calcraft* (*s*), where the plaintiff sought to obtain relief against an ejectment, brought, as he alleged, for non-payment of rent, but as the defendant in equity, the lessor of the plaintiff at law, alleged, for other breaches of covenant: the best statement of the judgment is to be found in Lord Eldon's own words (*t*). "In *Wadman v. Calcraft*, the Master of the Rolls lays down, as doctrine making a strong impression on his mind, that though against an ejectment for non-payment of rent, the Court would relieve upon a principle long acknowledged in this Court, but utterly without foundation, it would not relieve, where the right of the landlord accrued, not by non-payment of rent, but by non-performance of covenants, which might be compensated by damages. That case coming afterwards before me, my mind was so strongly impressed with the distinction between this sort of covenant, and a covenant for non-payment of a sum of money or rent, that I acted upon the distinction; and put the party to an immediate inquiry, to ascertain, whether upon the non-performance of this species of covenant, the right of entry could be acted upon at law; and, as it appeared, that the ejectment might be maintained, no relief was given" (*u*).

Sanders v. Pope (*v*) before Lord Erskine, was undoubtedly decided on a different principle: there the covenant having been to lay out a fixed sum in repair, his Lordship relieved against a breach on the sum being actually laid out. But it is quite obvious, that in this case the Court was directing the performance

(*s*) 10 Ves. 67.
(*t*) 18 Ves. 58.

(*u*) 18 Ves. 50.
(*v*) 12 Ves. 282.

of repairs, which the Court has no jurisdiction to do. The Chancellor seems to have mixed up the notion of the damages recoverable, with that of performance of the contract; and to have said, that in the case of general damages, the Court could not relieve, although it might when the payment was to be a specific sum of money. But the decree made by his Lordship directed an inquiry, whether any and what further sum was necessary, to put the premises in the same state of repair, in which they would have been, if the money had been applied according to the contract; this inquiry introduces all the uncertainty which it was wished to avoid. This case, however, cannot be relied on as an authority.

In *Hill v. Barclay* (*w*), Lord Eldon refused to extend the relief against forfeiture to the breach of the covenant to repair. He particularly objected to the decision in *Stack v. Leonard* (*x*), where the Lord Chancellor seems to have thought, that if repairs were done at the close of the term, it was better for the landlord: this decision was relied on in *Sanders v. Pope* (*y*). But Lord Eldon denied the power and authority of the Court thus to deal with contracts; he said it was taking a prodigious liberty with a contract, by which the tenant has undertaken forthwith to repair, and to keep the premises in repair constantly (*z*). He also said, that if relief could be given, his opinion in other cases must be wrong. He had held that a tenant who has committed waste, treated the land in an unhusbandlike manner, and been guilty of various breaches of covenant, for which

(*w*) 18 Ves. 59.
(*x*) Amb. 619.

(*y*) 12 Ves. 282.
(*z*) See 18 Ves. p. 62.

the lessor had a right of re-entry, should not have a specific performance of an agreement for a lease (a).

In the case of a covenant to repair, the objection that the Court has no power to see that the agreement to repair is properly performed, was mentioned; but it was not on this ground that Lord Eldon refused the relief; it was because the contract between the parties that repairs should be executed this year, would not be executed by the repairs being executed next year. His Lordship applied this doctrine to the still stronger case, of a covenant to insure: this covenant having been broken, the landlord brought an ejectment; the house had since been insured, but Lord Eldon thought that fact no ground for relief in equity. He said, "Where a man has covenanted to keep premises demised to him, insured from fire, that the lessor may not be exposed to that evil, as the tenant cannot himself reimburse him, and the effect of that contract is secured by reserving a right of entry, if the tenant has wilfully and obstinately prevented that insurance, and it has so subsisted for one, two, or three years, (for where is it to stop) upon what principle is a Court of Equity to say, that a tenant, who has so neglected to fulfil his contract, shall insist, that the landlord shall keep all the terms with him, as if he had duly performed it" (b)? And in another case the same learned Judge refused the injunction. He said that he had looked carefully into the cases, and thought they did not bear out the proposition which was meant to be inferred from them, that the Court

(a) See *Western v. Pim*, 3 V. & B. 197.

(b) *Reynolds v. Pitt*, 19 Ves. 134.

will, in cases of forfeiture for breach of covenant, give relief upon the principle of compensation (c).

In *Eaton v. Lyon*, Lord Alvanley, M. R., says, "At law, a covenant must be strictly and literally performed; in equity, it must be really and substantially performed according to the true intent and meaning of the parties, so far as circumstances will admit; but if by unavoidable accident, if by fraud, by surprise or ignorance, not wilful, parties may have been prevented from executing it literally, a Court of Equity will interfere, and upon compensation being made, the party having done everything in his power, and being prevented by the means I have alluded to, will give relief. It is true, that has been formerly carried to a length, that became in some degree alarming. They got into the habit of construing terms and conditions of covenants, as being only *in terrorem*: but undoubtedly in modern times that has been much restrained; and it is now perfectly understood, that even in the purchase of an estate, if money has been covenanted to be paid at a given day, if it is not paid at the day at law, no action will lie; but if the party can shew that he took the means of paying it, and has been prevented by accidents not in his power, the Court will dispense with the strict performance of it: because, as it was formerly said, it is not of the essence of the contract; but it may be of the essence of the contract; and the party shall not avail himself of equitable circumstances, unless he shews that there has been no wilful neglect or misconduct on his part" (d).

(c) *White v. Warner*, 2 Mer. 459. (d) *Eaton v. Lyon*, 3 Ves. 690.

As to the payment of money, Lord Eldon said, that time not being of the essence of the contract, even though the lapse of time has not arisen from accident, equity would relieve, in the case of a sale (*e*); and, as to a covenant to insure, he said, in *Reynolds v. Pitt*, it was admitted, that there was no case of relief against the breach, wilful and obstinate, or not, of a covenant to insure (*f*). But it is apprehended that these cases are within Lord Alvanley's rule, at least the case of a covenant to insure, as no compensation could be made for the risk, the landlord has run: as to money payments, Courts of Equity have interfered upon the notion of interest being a compensation, without any other equitable circumstance. In the case of a covenant to repair, Lord Eldon said, there might be a distinction in cases of accident and surprise; the effect of the weather, for instance, or permissive want of repair (*g*).

Lord Erskine, in *Sanders v. Pope*, as to repairs, puts the case of laying out £199 instead of £200, knowing that the whole sum had not been expended, and not to be accounted for by ignorance or accident, and asks if equity would not relieve in that case. The later decisions enable us to reply in the negative, for there is no equity in the person, who wilfully violates his contract, to come to the Court, to screen himself from the consequences.

In a recent case, there was a power to a patentee, in

(*e*) *Levy v. Lindo*, 3 Mer. 81,
and see Lord Erskine's Obs. in
Sanders v. Pope, 12 Ves. 289.

(*f*) 19 Ves. 134.

(*g*) *Hill v. Barclay*, 18 Ves. 62;
*Hannam v. S. London Waterworks
Company*, 2 Mer. 67 (*n*).

a deed of license to use his invention, to revoke the license, on the wilful neglect or default in the performance of the covenants in the deed; one covenant was to render a true account within one month after Lady-day and Michaelmas, in every year; and another to give a month's notice of the licensee changing his place of business. Sir L. Shadwell said, "that in the view of a Court of Equity, where there has been a breach of covenants, such as are contained in this deed of license, where recompence cannot be made by payment of money, the Court does not interfere to relieve the party from the breach he has committed." After alluding to the case of *Reynolds v. Pitt*; he adverted to an argument, that the Court ought not to act upon the breaches which had taken place, because, if an action or actions were brought, damages might not be recovered, and said, "I have to observe, that that is not the rule of this Court; because I can easily conceive that, in a case like *Reynolds v. Pitt*, if the insurance ought to be made on the Wednesday, and was not, and an insurance was made on the Thursday, if an action had been brought on the covenant, the jury might take into their consideration, that the insurance on the Thursday, when no fire had happened on the Wednesday, was as good as an insurance on the Wednesday: and might, perhaps, give no damages." His Honour also observed, that in his opinion the word "wilful," could have no other meaning than "spontaneous;" and, if the neglect or default in this case arose from the voluntary act of the parties, either awake or asleep, with reference to their rights and interests, and did not at all arise from the pressure of

external circumstances over which they could have no control, he apprehended that the neglect or default was wilful (*h*).

Sir John Leach said, in *Harris v. Bryant* (*i*), "a Court of Equity will relieve against the effect of an express covenant, where strict performance of the condition is prevented by ignorance not wilful or by unavoidable accident. Ignorance is considered to be wilful, where a person neglects the means of information, which ordinary prudence would suggest; and accident is not unavoidable, which reasonable diligence might have prevented."

In *Green v. Bridges* (*j*), land was let for 999 years, at a yearly rent, with a covenant to insure, and a proviso for re-entry, on breach of covenant. The lessee entered, and spent a considerable sum of money and insured, but for a short period, the buildings were not insured at all. The defendant brought an action of ejectment. The plaintiff filed a bill to restrain the action, alleging that the breach was involuntary, and that the defendant had sustained no damages. Sir L. Shadwell, V. C., refused to continue the injunction. He said Lord Eldon, in *Reynolds v. Pitt*, laid it down that the Court would not relieve, except in cases where payment of money is a complete compensation, and will put the party in the same situation as he would have been in, if there had been no breach. In this case there has been a wilful breach of covenant. The landlord could not by any payment of money, be put into the same situation as he was entitled to be under the covenant.

(*h*) *Elliot v. Turner*, 13 Sim. 477.

(*i*) 4 Russ. 89.

(*j*) 4 Sim. 96.

Where a farm has been held, and treated in an unhusbandlike manner, and where there would have been a right of re-entry in the lease, if a lease had been executed, the Court would not continue an injunction, with a view to a specific performance, which, if the agreement was specifically performed by executing a lease, would have been put an end to by the clause of re-entry, that must have been introduced in that lease (*j*). Lord Eldon said, there might be a case, where even if no right of entry was to be introduced, under an agreement for a lease of a farm, yet the Court seeing a gross case of waste, which will in all cases be a forfeiture of the place wasted, considerable or not, and gross breaches of covenant that could not well be indemnified by damages, would leave the tenant to law and grant no relief here (*k*).

The rule in all these cases is, that the same construction is to be followed in equity as at law; the question being, what is the real meaning of the parties; and if that be ascertained by a Court of Law, there is no equity to interfere (*l*). Equity and law cannot differ as to the construction of an instrument, though the effect of it may be different in the two Courts (*m*).

On this ground, in those cases where there was a legal as well as an equitable remedy, it was for a long time the practice to send the parties to law first, and force the plaintiff to establish his legal right, before he was held entitled to general relief. It is often said, that this was the practice in all suits for specific per-

(*j*) *Gourlay v. Duke of Somerset*, 115; *Lufkin v. Nunn*, 11 Ves. 170.
 1 V. & B. 72. (*m*) *Browne v. Warner*, 14 Ves.
 (*k*) 1 V. & B. p. 73. 156. 409; *Gladstone v. Birley*,
 (*l*) *Holtzapffel v. Baker*, 18 Ves. 2 Mer. 401.

formance before the time of Lord Somers (*n*), but this is not correct, equity often interfered where there was no relief obtainable at law (*o*).

Lord Hardwicke laid down the rule, that if there can be no action at law according to the words of the articles and the events that have happened, there are few cases in which a Court of Equity will decree a specific performance. An objection by reason of the form of the agreement may be fatal at law; but will not be so in equity; but if the objection at law is one of substance, it is equally fatal in equity (*p*).

In all cases of covenants the Court of Chancery, on application to have them decreed in specie, considers what was the intention of the parties covenanting, and if that was, that the parties should rely and depend upon the security of the covenant only; equity will not alter the security agreed to be accepted of or vary the remedy. For that would be going beyond, and consequently against the intent of the parties.

Therefore, where A. on his daughter's marriage, covenanted to leave her £1000, to be paid within six months after his death, and his grandson, her representative, filed a bill, praying that A., the grandfather, might give security for a performance of this agreement. The Court refused to make such a decree, because the daughter and her husband had agreed to accept of the covenant, and equity would not alter the contract of the parties (*q*).

So in *Brough v. Oddy*, the Master of the Rolls said,

(*n*) *Dodsley v. Kinnersley*, Amb. 406, Sel. Ca. Cha. 67. 69; *Earl of Uxbridge v. Bayly*, 1 Ves. 491, see p. 504.

(*o*) *Camel v. Buckle*, 2 P. W. 243.

(*p*) *Whitmel v. Farrel*, 1 Ves. sen. 256.

(*q*) *Warrington v. Langham*, Pre. Ch. 189, 1 P. W. 107; see *Colles*, P. C. 149.

the engagement was to pay a sum annually by quarterly payments, if a certain event happened; that admitting the event to have happened, on which the payment were to be made, the remedy of the plaintiff was by an action at law; that he was not aware of any case in which where the contract created only a personal obligation, the Court had ordered a party to give security on property for its due performance (*r*).

An attempt was made also where an annuity was charged by will on real estate, to get it charged by deed, but the Vice Chancellor held that there was no such equity (*s*). This was also decided in *Clifford v. Turrill*, where the bill prayed security for an annuity agreed to be paid, which was refused; but the annuity being in arrear, an account was directed to be taken of the arrears, and payment of the annuity was directed for the future (*t*).

The Court will not in the case of a bond for indemnifying a person against the consequences of the default of other parties, upon their default extend the legal effect of the bond, so as to direct the setting apart of a sum sufficient to answer the possible claim: the liability is created by law, and the extent of it will be determined by the Courts of Law only (*u*). So where a person having in articles of partnership covenanted after the determination of the partnership, not to practise as a surgeon within a certain district; the Court would not, before the determination of the partnership, restrain him from soliciting business as a

(*r*) 1 R. & M. 55.

(*s*) *Franklin v. Drake*, 5 Jur. 1078.

(*t*) 1 Y. & C., C. C. 138; aff. on

appeal, 14 Law. J., Rep. N. S. Ch. 396.

(*u*) *Antrobus v. Davidson*, 3 Mer.

569.

surgeon. The Vice Chancellor, Sir John Leach, said, that unless it was a breach of covenant at law, the Court would not interfere, as the Court was to execute, and not to make agreements for parties (*v*).

This doctrine seems to throw doubt upon the jurisdiction exercised by Courts of Equity on *quia timet* bills; by which formerly relief was frequently obtained beyond the law: but we apprehend the Court properly assumes jurisdiction to prevent a mischief which is likely to occur.

Thus, Sir Thomas Clarke, M. R., directed that a party who had covenanted to pay a specific sum to B. if B. survived him, and who had aliened part of it, should pay it into Court, if he did not give security forthwith (*w*). So a surety may in equity compel his principal to disencumber his estate, the Court holding it unreasonable, that a man should always have such a cloud hanging over him (*x*).

In *Ward v. The Duke of Buckingham*, upon a lease of alum works, with a covenant by the lessee to leave stock of a certain amount upon the premises, there was a fair ground of suspicion that he did not mean to perform his covenant in that respect: the Court said, though there might be compensation in damages, it had relation to that sort of enjoyment for which the landlord had stipulated, after the expiration of the term, and a sort of decree *quia timet* was made and affirmed by the House of Lords (*y*).

(*v*) *Coates v. Coates*, 6 Mad. 287; see *Williams v. Cheney*, 3 Ves. 59.

(*w*) *Flight v. Cook*, 2 Ves. Sen. 619; *Fember v. Mathers*, 1 B. C. C. 52.

(*x*) *Lee v. Rook*, Mos. 313; Earl

of Ranelagh *v. Hayes*, 1 Vern. 190. See Mr. Daniell's Note to *Wright v. Bell*, Daniell's Exchequer Cases, 96.

(*y*) Per Lord Eldon, 10 Ves. 101.

Sir William Grant held, that a covenant in the lease on the part of the lessee, to leave the premises in good repair, would not prevent an injunction to restrain him, from wilfully destroying them during the term (z).

Lord Cottenham said, in *Wellesley v. Wellesley* (a), "If there be a contract for sale, and the vendor proceed so to deal with the property as to incapacitate himself from performing his contract, the Court will act upon the property;" and there are frequent instances of the Court restraining by injunction a vendor from parting with his estate, after a contract for sale (b).

(z) *Mayor of London v. Hedger*, 18 Ves. 356.

(a) 4 M. & C. 577.

(b) *Echliff v. Baldwin*, 16 Ves. 267; *Curtis v. The Marquis of Buckingham*, 3 V. & B. 168; *Spiller v. Spiller*, 3 Sw. 556; *Nicholson v.*

Knapp, 9 Sim. 326; *Lord Langdale*, in *Turner v. Wright*, 4 Beav. 40, refused the relief, saying the purchaser must rely on the doctrine of *lis pendens*, but as to this, see *Hood v. Aston*, 1 Russ. 412.

CHAPTER IV.

When the Court assumes jurisdiction, it allows no relief to be obtained at Law.

If any part of the relief founded on the contract cannot be enforced in equity, there is, as we have seen, no mutuality, and the Court will not interfere. On the other hand, if the contract is one, which the Court can and does specifically perform, it will not allow any part of the relief to be obtained at law. "Whether the parties stand in the relation of vendor and purchaser," said Lord Cottenham, when Master of the Rolls, "is a question to be determined by this Court, in the suit for specific performance of the contract. That suit gives the Court jurisdiction over the whole matter, and the Court will not permit the defendant to continue proceedings at law respecting the subject of the suit" (a).

In the case of *Nelson v. Bridges*, Bridges verbally agreed to grant to Nelson, a license to get stone out of his land at a fixed rent; Nelson entered, and partly performed his agreement: afterwards Bridges agreed to let the same land to another person for similar purposes, and brought an ejectment against Nelson.

(a) *Drummond v. Figou*, 2 M. & K. 172.

Bridges recovered in ejectment, and Nelson obtained a decree for specific performance; in the meantime, a quantity of stone had been removed by Bridges' direction. Nelson filed a supplemental bill, stating this fact, praying for a reference to the Master to ascertain the damage, and that the amount might be paid by the defendant.

It was urged in favour of the bill, that in a case in which the Court entertains jurisdiction, the whole relief must be had there, and a party would not be allowed to obtain part of his remedy there, and part in a Court of Law.

Lord Langdale, M. R., said, "The plaintiff had obtained a decree for specific performance: if the facts had been known at the first hearing, I cannot have the least doubt but that the Court would, in the exercise of its jurisdiction, have put in a due course of investigation, the question of the amount of compensation which ought to be made to the plaintiff * *. It is said that such compensation might originally have been had at law, or, if not, that at least it might have been obtained at law, by perfecting the decree for the specific performance of the agreement in some particular form. I am of opinion, that it is not necessary for this Court, when it has once entertained jurisdiction in a case to resort to that circuitous mode of giving relief: I think, moreover, that if this matter had been before the Court at the first hearing, it would have been put in a proper train of investigation." His Lordship directed an action *quantum damnificatus* to be brought (b).

In *Carrick v. Young*, a bill was filed for the specific performance of an agreement by the defendant to take a lease from the plaintiff: the defendant had been let into possession, and the plaintiff brought an action at law for use and occupation. On an exception to the Master's report that the plaintiff was proceeding at law and equity for the same matter; the Vice Chancellor, Sir John Leach said, "If this Court should decree a specific performance of the agreement, it will, of course, decree an account of the rent due under the agreement; and the action at law is brought for the same object. I think, therefore, that the Master is right. If the plaintiff was unwilling to wait for the rent until the decree, he might move here, that the defendant should immediately pay that rent, which in every event, would be due from him in respect of the occupation" (c).

So in *Reynolds v. Nelson*, the same learned Judge held, that after a decree for specific performance against a defendant, he cannot proceed, by action at law on the contract, for damages (d), because it had been decided he had dispensed with the condition on which he ought to recover them.

If any proceedings are to be taken at law, liberty must for that purpose be given by the Court (e). In a late case, where the defendant agreed to convey certain land to the plaintiff, and the plaintiff agreed to erect a bridge, after a decree for specific performance, and pending a reference to the Master to settle the

(c) 4 Madd. 437.

(d) 6 Madd. 290; *Mills v. Fry*, 19 Ves. 277.

(e) Per Lord Eldon, in *Carwick v. Young*, 2 Swan. 239; see p. 243.

conveyance, the defendant brought an action against the plaintiff for damages for not having erected the bridge. Lord Lyndhurst said, "No action could be brought upon the contract up to the time of the decree. Supposing there was improper delay in the Master's office, the whole proceedings were before the Court, and it was competent to the party complaining of such delay to apply to the Court, and, if he were so advised, to move for liberty to bring an action. Had such a course been adopted, the Court might, if it had seen occasion, have directed an action to be brought; but the defendant had no right to resort himself to a Court of Law, pending the proceedings in the Master's office" (f).

In *Fennings v. Humphery*, there was an agreement by the plaintiff to take a lease from the defendant, who was to erect a crane and do certain other acts upon the premises leased. These he did not perform; and the plaintiff's rent being in arrear, the defendant brought an action for it. The plaintiff filed a bill for specific performance of the agreement to grant a lease and an injunction, and alleged that the defendant had not done the acts, but did not pray that they might be performed. The plaintiff also brought an action against the defendant, for not performing the acts: on a motion to discharge an order for reference as to the proceedings in law and equity being for the same matter. Lord Langdale, M. R., said, "The plaintiff's bill alleges that the defendant has failed to erect the new buildings, to erect the crane, and to keep the pre-

mises in repair, according to his covenant, but does not specifically pray that the defendant may be ordered to do those acts; and the acts are of such a nature, that this Court could not order them to be specifically done * *. As by the bill, she asks for a specific performance of the agreement, if, by the action, she sought for compensation for its entire non-performance; one proceeding would allege that the agreement could and ought to be performed, and the other proceeding would allege or imply, that the performance of the agreement having been abandoned or become impossible, compensation in lieu of performance should be given. The two proceedings would be inconsistent with each other * *. But considering the allegations in this bill, and the relief specifically prayed for: considering the particulars of this agreement, and what parts of it this Court can, and what parts of it the Court cannot, decree to be performed, in specie; and considering that the action is brought for damages for the non-performance of particular acts, the performance of which is not specifically prayed by the bill; and which, if they may be conceived to be included in the general words, "specific performance," or in the prayer for general relief, are not acts, the specific performance of which can be decreed; and, moreover, that the action is brought only for such damages as were sustained up to the time when the action was brought; it appears to me, that the action is not founded on any implied abandonment or cesser of the agreement, but is consistent with the continued existence of the contract, and of the plaintiff's title to have it specifically per-

formed, if there be no other objection to its specific performance. Under these circumstances, I think that the action and the suit are not prosecuted for one and the same thing, and I am of opinion that the order ought not to have been made" (g).

Now it is impossible not to observe, that this anomaly of proceedings at law and equity upon the same contract, a contract which the Master of the Rolls said, "was but one agreement, though several things are agreed to be done;" arose from the permitting the bill to be brought for specific performance, of a contract of which the Court could not ensure the perfect performance: this, as we have seen, is in direct opposition to the doctrine of the Vice Chancellor of England, in *Kimberley v. Jennings*, and that of Lords Lyndhurst and Cottenham, in *Hills v. Croll*, and *Dietrichsen v. Cabburn*; so far as the decision in *Fennings v. Humphery* proceeds upon the assumption, that the partial performance of a contract will be enforced, it must be considered questionable.

If any proceedings should be required at law, an application to the Court would be proper, but without this, proceedings at law after a suit upon the same contract, must be a contempt of Court. Once indeed the jurisdiction of equity was so little relied on, that the Court would not direct incidental relief that might have been obtained at law. "The Court would not decree," said Sir Thomas Clarke, M. R., in 1755, "performance of an agreement, for letting the plaintiff into a trade, and then decree damages for delay, in not letting him sooner; for that the plaintiff might have had, if he had used his remedy at law" (h).

(g) 4 B. 1.

(h) Anon. 2 Ves. sen. 629.

But the doctrine is now established, and is applied in every day practice. In *Dakin v. Cope*, which was the sale of a Public-house, the defendant was directed not only to pay for the house, but also the rent, taxes, and other necessary outgoings; he had been directed by the Master of the Rolls (Lord Gifford), to pay what had been laid out by the plaintiff in carrying on the business, so as to prevent the subject-matter of the contract from perishing. But Lord Eldon overruled this part of the decree, and said, that there was no precedent for such a decree, unless it had been the contract. In this case, it was clear that the specific performance was only the payment of the purchase money, and that these claims arising from the non-performance of the contract, were claims which could be properly established at law, but the Court took upon itself jurisdiction in the whole matter.

The principle of a Court of Equity is that, unless it can make a complete decree, it will not interfere: on this ground it will not decree the partial redemption of a mortgage (*i*), if the agreement ought to be executed, the Court does not use foreign aid to carry it into execution (*j*).

In a case in which the deposit had been paid to the solicitor of the vendor, and by them paid away: on a bill for specific performance, the vendee prayed a declaration, that the solicitors who were parties to the bill, were liable to pay the sum, and that it should be brought into Court; notwithstanding it was re-

(*i*) Sir E. Sugden *arg.* *Agar v. Macklew*, 2 S. & St. 418.

(*j*) *Gourlay v. The Duke of Somerset*, 19 Ves. 431.

coverable at law. Lord Langdale, M. R., decreed according to the prayer (*k*).

To this doctrine, however, the language of Lord Cottenham in a recent case appears opposed: his Lordship said, "With respect to the decreeing specific performance of a lease after the term had expired. In the earlier cases it was not necessary, because in practice the Court assumed jurisdiction to inquire on the part of the plaintiff, what damages had been sustained by the contract not having been performed at an earlier period. But that course has not been followed. It has not been considered consistent with the principles on which that practice is founded, for this Court to assume that jurisdiction. There are instances to be found at an earlier period, which may not now be considered as part of the practice of this Court" (*l*).

In *Garrard v. Grinling*, (bill filed 1809, heard 1818), the bill prayed specific performance of an agreement for a lease and compensation for the time which had elapsed since the lease ought to have been made. No objection was made to the form of the prayer (*m*).

In *Browne v. Warner*, Lord Eldon said, "The case admits a relief, more limited: upon the whole so interpreting the contract as to give him an effectual remedy for the payment of that £40: decreeing, either that he shall pay that sum, or shall execute some lease that would enable the plaintiff to recover at law" (*n*), and this statement reconciles the doctrine of Lord Cottenham, with the general practice of the Court. If there be a specific sum to be paid, the Court will not

(*k*) *Wiggins v. Lord*, 4 Beav. 31.

(*m*) 2 Sw. 218.

(*l*) In *Mundy v. Jolliffe*, L. J. R.,
N. S., Vol. ix. p. 97.

(*n*) 14 Ves. 156. 409.

only put the plaintiff into a position to recover that at law, but will also, to save the multiplicity of suits, at once decree the payment; but if the claim is merely in damages, the Court contents itself with directing such instruments to be executed as were agreed to be executed, and leaves the parties to proceed upon these instruments, and to recover damages at law without coming back to the Court.

In a recent case, on a bill filed for the specific performance of an agreement, and for an account of arrears of rent, the term having expired before the hearing, the Court of Exchequer directed an account of the arrears (*o*).

Although a Court of Equity grants entire relief, it will not allow persons who are not parties to the contract to be made parties to the suit specifically to enforce it, notwithstanding that complete performance of the agreement can only be effected by their concurrence.

"I apprehend," said Lord Eldon, "that when a bill is filed for a specific performance, it should not be mixed up with a prayer for relief, against other persons claiming an interest in the estate. If there was a title in other persons that the plaintiffs (who were the vendors), were bound to get in, they should have filed a bill for a specific performance only, and should have fortified the defects of title by such mode as they could, so as to be able to complete it by the time when the contract would be to be enforced" (*p*).

In *Tasker v. Small*, a party alleging that he had

(*o*) *Wilkinson v. Torkington*, 2 Y. & C. 726.

(*p*) *Mole v. Smith*, Jac. 490, see p. 494.

power under his marriage settlement, to raise by sale a large sum of money, contracted to sell the property: the purchaser filed a bill against the vendor and his wife. It was objected that she ought not to have been made a party to the suit: the Vice Chancellor said he had some doubt upon the point: but he afterwards said, "Tasker [the purchaser], having got the contract, has a right to have it performed; and the legal estate being in Phillips, he is not willing to convey it, point blank, to Tasker, but desires that if he does, he shall have competent authority for so doing. Then the bill is filed; and, as the question is raised, whether the legal estate can be so conveyed, Mrs. Small is, of necessity, made a party to the suit. Therefore, on account of the hesitation of Phillips to reconvey the estate, the suit is rightly constituted by making Mrs. Small a party" (9).

This decision was reversed by Lord Cottenham. His Lordship's judgment puts the whole matter in its true light. He says, "It is not disputed that, generally, to a bill for a specific performance of a contract of sale, the parties to the contract only are the proper parties; and, when the ground of the jurisdiction of Courts of Equity in suits of that kind is considered, it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a Court of Law giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings, is to place the party com-

plaining, as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious, that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it, as they are to a proceeding to recover damages for the breach of it. And so is the admitted practice of the Court; but it is said that this case ought to be an exception to the rule, because Phillips, in whom, as first mortgagee, the legal estate is vested, is not willing to convey it to the plaintiff, the purchaser, without having competent authority for so doing, and that the question being raised, whether the legal estate can be so conveyed, Mrs. Small is of necessity made a party to the suit." His Lordship then said, that Phillips being a mortgagee, could only have a bill for redemption filed against him, that this bill was not such a bill, and if it had been that the plaintiff having only contracted to buy the equity of redemption, could not file it; that Phillips himself was not a proper party, and that Mrs. Small was not a proper party, as being a stranger to the contract. He referred to Lord Eldon's language, which we have quoted, and added: "Such was his opinion in a case in which the vendor was plaintiff, and the defendants were persons whom the vendor might compel to join in completing the title. How much stronger is the objection where the purchaser is the plaintiff, and the only connection between him and the defendants is the incomplete disputed contract" (r).

(r) *Tasker v. Small*, 3 M. & C. 68.

Again, in *Wood v. White*, Lord Cottenham observed, "The contract is in the usual form, between John Wood, the vendor, and Thomas White, the purchaser, and they alone ought to have been parties to the suit; instead of which the trustees of Mrs. Lucas' settlement, and she and her husband, are made parties co-plaintiffs with the vendor, John Wood. If their concurrence had been necessary to give security to the purchaser, as is stated to have been advised by the conveyancer consulted, it was for John Wood to bring them forward to assist in giving effect to his contract; but as plaintiffs, they have no title to sue" (s).

Nor could they have been brought forward as defendants, except with their consent, and at the costs of the plaintiff.

In *Douglas v. Horsfall* (t), it seems to have been held, that a trustee who had made an agreement for a lease of the trust property, could not file a bill for specific performance, without making his *cestui que trust* parties: and because the plaintiffs being trustees for a Gas Company, had not made any of the members of the company parties, a demurrer was allowed to their bill for specific performance.

In the case of *Mare v. Malachy* (u), Lord Cottenham, C., put this case: "Suppose the bill alleges the ordinary case of a Joint Stock Company, and that the shares are transferable by the delivery of the scrip receipts, and that the holder thereof has a right to sell the shares in his possession, and that he has sold them,

(s) *Wood v. White*, 4 M. & C. 101; *Meriel v. Wymonswold*, Vin. 460. Ab. 5. 511.

(t) 2 S. & St. 184; *Cullen v. Duke of Queensbury*, 1 B. C. C. (u) 1 M. & C. 572.

and that the seller refuses to complete the sale, and the bill is filed to compel a specific performance of the contract for purchase; the question will then be, whether A. or B. is entitled to a certain share or certain shares, are the company, (if a corporation), or the trustees), necessary parties to the bill?" It was admitted that they would not be necessary parties, and *Doloret v. Rothschild* (v) was cited. Is this not the converse case of *Douglas v. Horsfall*?

His Lordship disposed in his judgment in *Mare v. Malachy*, of an objection to the suit (which was between parties respecting shares in a Mining Company), that the interests of other persons might be affected by the decree, and therefore they ought to be made parties. "It is said," observed his Lordship, "that the result of this suit might be, that although the contest was in form a contest between A. and B., it would appear by the adjudication, that one of them was entitled to make a demand upon another party, and, that that other party should be before the Court, in the suit between A. and B. But this objection, it is obvious, might arise in almost every case. Suppose the case of stock standing in the books of the Bank of England, and in a suit to which the Bank were not parties, the right to that stock were established to be in a particular person, the Bank would not be necessary parties, merely because that person might be obliged to institute a suit against the Bank, to recover the dividends to which this right had been established in the former suit" (w).

(v) 1 Sim. & Stu. 590.

(w) See 1 M. & C. p. 576.

BOOK III.

ON THE CONSEQUENCES OF THE DOCTRINE THAT EQUITY ENFORCES THE SPECIFIC PERFORMANCE OF CONTRACTS.

CHAPTER I.

That which is agreed to be done, is considered as done.

IN *Frederick v. Frederick*, Lord Macclesfield, C. said, that "where one for a valuable consideration agrees to do a thing, such executory contract is to be taken as done: and that the man who made the agreement shall not be in a better case, than if he had fairly and honestly performed what he agreed to do" (a). This doctrine follows directly from the principle that contracts are to be specifically performed. In that case a man had agreed upon his marriage to become a freeman of London, but died without having taken up his freedom. The Chancellor decided that his estate should be distributed as if he had become a freeman (b).

In a case where a husband in 1774, covenanted in consideration of a sum of money paid to him, the produce of his wife's estate, to settle lands of the same value in the county of Norfolk by way of set-

(a) 1 P. W. 710.

(b) 1 P. W. 710, aff. in D. P., 4 B. P. C. 7.

tlement, it was decreed in 1812, by Sir Wm. Grant, M. R., following a decision by Lord Eldon (*c*), that the plaintiff was entitled to have as much money laid out in land pursuant to the covenant, as would at the time of the decree be the value of an estate in fee simple, in the county of Norfolk, worth in 1776, the sum of money agreed to be then laid out (*d*).

It is upon this principle that the whole interest of a vendor, is by the agreement for sale parted with in equity. So far as a Court of Equity is concerned, the estate passes by the contract. A contract for a purchase is an equitable title; and the party, having such title, is in equity, to most purposes, considered as the complete owner of the estate. Although it is true, that equity does not in every case lend its aid to carry a contract for a purchase into execution; yet it does not arbitrarily execute one contract, and refuse to execute another (*e*). If the contract be one which the Court considers ought to be performed, the parties stand in the same relative position as if it had been performed.

In equity, an estate agreed to be purchased, is considered as the estate of the purchaser from the time of the contract, and the purchase money from that time is held to belong to the vendor (*f*). Nothing is better established than this principle: that money directed to be employed in the purchases of land, and land directed to be sold and turned into money, are to be considered

(*c*) *Lewes v. Popkin*, see 3 Mer. 701; and *Barker v. Ivers*, 5 Bro. P. C. 127 (Tomlin's Ed.); *Badger v. Badger*, Mos. 117.

(*d*) *Dowager Lady Suffield v.*

Lord Suffield, 3 Mer. 700.

(*e*) See 9 Ves. 608.

(*f*) Per Sir T. Plumer, V. C.; *Acland v. Gaisford*, 2 Madd. 83.

as that species of property, into which they are directed to be converted; and this, in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlements or otherwise; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund may, or the contracting parties, may make land money or money land (*g*), and parol evidence of the mode in which the owner of the fund regarded it is enough (*h*).

In *Paine v. Meller*, Lord Eldon held, "that the accident of the house purchased, having been destroyed by fire, after the contract for sale of it was entered into, was no ground for the purchaser's refusing to complete." As to the mere effect of the accident itself, no solid objection can be founded upon that simply; for if the party by the contract, has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heir. If a man had signed a contract for a house upon that land, which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable, on account of his projects, that he should not have it (*i*).

(*g*) Per Sir Thomas Sewell in *Fletcher v. Ashburner*, 1 Bro. C. C. 497, quoted by Lord Alvanley, M. R., in *Wheldale v. Partridge*, 5 Ves. 397.
 (*h*) 6 Ves. 349.
 (*i*) 2 P. W. 174.

The same doctrine is laid down by Sir Thomas Plumer, V. C., in *Harford v. Purrier* (j). "It is the established doctrine of equity, that if a contract to purchase is to be completed at a given period, and the title is finally made out, the parties continuing in treaty, and the purchaser not by any acts released from his bargain, the estate is considered as belonging to the purchaser from the date of the contract, and the money from that time as belonging to the vendor. Ever since the 17th June, 1813, therefore a good title having been made, the estate must be considered as the estate of the defendant, and he has a right to an account of the rents and profits from that time: and the vendor is entitled to the purchase money, with £5 per cent. interest according to the contract, from the same period: and the consequence is, that if after the contract, the estate be improved in the interval, or if the value be lessened by the failure of tenants, or otherwise, and no fault on either side, the vendor has the benefit or sustains the loss, if there is a loss by fire after the contract, and before the completion of it; if neither party is in fault, the loss falls upon the vendee, as was held in *Paine v. Meller*, and admitted in the later case *Ex parte* (k) *Minor*, though there, the bidding not being confirmed by a report, the Lord Chancellor, on the authority of the Attorney General *v. Day* (l), held the vendor was responsible for the loss. The gain or loss in an estate falls upon the person to whom the Court holds the estate to belong. If a reversionary interest is agreed

(j) 1 Mad. 532.

(k) 11 Ves. 559.

(l) 1 Ves. sen. 221.

to be purchased, and lives drop before the conveyance, the vendor has the benefit (*m*). "The same rule prevailed in the Civil Law" (*n*).

The consequences of this doctrine are, that any advantage or loss must fall upon the vendees, but as this principle only applies to mere accident, and not to any loss which might have been prevented, the question who should bear any loss or deterioration in the estate, which might have been prevented, is to be determined by the inquiry, who is entitled to the possession of the property.

Sir Thomas Plumer says, "I have not found any authority which determines what is to be done with the estate during the interval when the title is under dispute: during the suspension of an executory contract. In equity, an estate agreed to be purchased, is considered as the estate of the purchaser from the time of the contract, and the purchase money from that time is held to belong to the vendors, but with respect to possession, there is no change in the notion of equity, until the purchase money is paid (*o*).

The language of Sir John Leach, in *Rawlins v. Burgis* (*p*), was to the same effect. "A purchaser before conveyance, is in equity owner of the estate to almost every purpose: I qualify the proposition: as before payment of the purchase money, he may be restrained from cutting timber. If before conveyance, a house should be burnt down, the loss would be his: if any

(*m*) *White v. Nutt*, 1 P. W. 62.

(*n*) *Inst.* iii. xxiv. 3; and see *Domat*, lib. 1, s. 7.

(*o*) *Acland v. Gaisford*, 2 Madd. 25.

(*p*) 2 V. & B. 387; see *Binks v.*

Lord Rokeby, 2 Sw. 227, and the cases collected in a note to *Minchin v. Nance*, 4 Beav. 342, and a note to *White v. Nutt*, 1 P. W. 61, ed. 1826.

acquisition, by lives dropping, should accrue, the profit would be his, as between the representatives of the purchaser, his interest is considered as real estate, and a contract to sell a devised estate has the effect of revoking a devise." The devise has no other effect than passing the legal estate, although it be in trust to sell the purchase money belongs to the executors (*q*).

In *Townley v. Bedwell*, Lord Eldon, following a decision of Lord Kenyon, held, that if a landlord give an option to the tenant to purchase the fee, and dies before the tenant exercises his option, the purchase money belongs to the executors of the landlord as his personal estate: but the rents and profits until the option is declared, go according to the freehold title. The decision was put by the counsel arguing in its favour, upon the principle, that when the condition is performed, the agreement becomes absolute; and there can be no distinction between an agreement so become absolute, and one absolute in its origin. Lord Eldon said, there might be a good deal urged against the decision, but being directly in point, he should follow it (*r*). In the case of *Shadforth v. Temple*, a contract dated the 3rd September, provided that the purchase was to be completed on the 13th of May next; but all rent was to belong to the vendor, his heirs, executors, and administrators. The vendor died intestate in January. Sir L. Shadwell decided upon the language of the contract, that the intermediate rents up to May,

(*q*) *Farrar v. Earl of Winterton*,
5 Beav. 1.

(*r*) 14 Ves. 591, T. & R. 281;

see also *Broome v. Monck*, 10 Ves.
597; *Collier v. Jenkins, Younge*,
295.

belonged to the heir (*s*). But it would seem that if nothing had appeared in the contract, it would have belonged to the heir upon the authority of *Townley v. Bedwell*: accordingly in a later case, the vendor dying intestate between the date of the contract, and the day fixed for its performance, Sir L. Shadwell, V. C., decided that the rents belonged to the heir. His Honor said, "The law favoured the heir rather than the executor;" (*t*) but independent of this, until the conversion took place, the property must remain in the same state, and it would be so held, if it was a contract, to turn money into land, instead of land into money (*u*).

If upon a marriage the husband covenant to assign lands to trustees, upon a trust at a certain period, to convert them into money, it makes no difference whether the estates are conveyed, or covenanted to be conveyed. That which is covenanted to be done is considered as done (*v*).

If a man, before marriage, enter into a contract for the sale of his fee simple estate, his subsequent marriage would not, in equity, be held to create any right of dower (under the old law), the husband is a trustee for the purchasers, and the Court would not allow the wife to assert her right of dower (*w*); so if the contract is made after marriage, but before the legal estate is vested in the husband (*x*).

Of course the contract must be such a one as equity

(*s*) 10 Sim. 185.

(*t*) 12 Sim. 263.

(*u*) See *Smith v. Claxton*, 4 Madd. 484.

(*v*) *Stead v. Newdigate*, 2 Mer.

521.

(*w*) Per Sir E. Sugden, L. C. J., *Lloyd v. Lloyd*, 4 D. & W. 370.

(*x*) *Id.*

would have enforced, but although laches might bar the right of the one party to claim specific performance, yet the property is changed as between the representatives of the other contracting party (y).

It is a further consequence of the jurisdiction assumed to enforce specific performance, that a contract by a party having an interest in property, respecting that property, affects the property itself; liens and equitable charges are thus established.

It is obvious, that in the case of an agreement to assign a thing not at the time existing, but only to come into existence at a future period; the remedy which the law gives for the non-performance of the agreement is grossly inadequate. The recovery of damages must depend on the solvency of the defendant, not at the time the contract is made, but at some future period. The law knows of nothing like the assignment of a thing to exist in *futuro*, and though it might raise an implied covenant or assumpsit upon the assignment, if the thing, on coming in *esse*, is not transferred (z); yet this does not affect the thing itself.

Lord Thurlow lays down the doctrine emphatically, that where parties come to an agreement relative to any subject, the subject itself is bound by the agreement; where parties come to an agreement as to the produce of land, the land itself will be affected by the agreement. The agreement converts the

(y) *Buckmaster v. Harrop*, 13 Ves. 456; *Johnson v. Legard*, T. & R. 281; *At. Gen. v. Day*, 1 Ves. Sen. 220, overruled in *Curre v.*

Bowyer, 5 B. 6 (n).

(z) *Bacon's Abr. Covenant*, B. note (c).

covenantor, and all persons claiming under him into trustees of the subject-matter for the covenantee (a).

So in *Curtis v. Auher* (b), the assignment of the future earnings of a ship was held to pass them in equity. Lord Eldon observed, that it had been determined that future earnings would not pass at law (c); in one case, he thought, it was held that, although you might assign the wool then growing on the backs of the sheep, you could not assign the future fleeces; but still it was a good equitable assignment, and rendered the future earnings liable in equity.

It was attempted to be argued in a late case, that if the assignment of future freight were void at law, it was also void in equity. This would have been true, if it had been void on the ground of illegality, but even at law it would answer to an agreement, capable of being enforced by an action for the breach: however, it was held to be clearly valid in equity, by Sir L. Shadwell. "Is there anything," asked his Honor, "in the policy of the law, to prevent an assignment of future freight by the owner of a ship. There can be no more objection to such an assignment, than to a contract for the assignment of the freight of a voyage intended to be made, by a ship, which the party making the contract, has it in contemplation to purchase; which is the case put, by Lord Eldon, in his judgment in the case of the ship *Warre*" (d).

The case of *Lyde v. Mynn*, further exemplifies the rule; *Mynn* had granted an annuity, and covenanted

(a) *Legard v. Hodges*, 3 Bro. C. C., 537; see *Power v. Bailey*, 1 B. & B. 49.

(b) 1 J. & W. 526; see pp. 531-2.

(c) *Robinson v. Macdonnell*, 5

Mau. & Sel. 228. In re *Ship Warre*, 8 Price, 269 (n).

(d) *Douglas v. Russell*, 4 Sim. 524; see p. 355; aff. 1 M. & K. 488.

to secure it out of any property which might come to him after his wife's death. Before her death he became a bankrupt, and obtained his certificate, at her death he became entitled to some property. Upon a bill filed to charge the property, the Vice Chancellor, Sir Lancelot Shadwell said, that the Act of 6 Geo. 4, c. 16, discharges the bankrupt; but does not discharge the property which he has made liable to the demand. The property which he has charged specifically, remains liable, although he is discharged from his personal obligation (*e*). It may be observed, that the certificate would not have barred the bankrupt from an action on his covenant (*f*).

The general principle is, that whether the subject-matter of the contract, be or be not in *esse* at the date of the contract, is immaterial, provided it be of such a nature and be so specifically described, that when it does come in *esse*, it is capable of being distinctly ascertained (*g*).

In a recent case, on articles of separation, dated June, 1834, between Mr. and Mrs. Wellesley, Mr. Wellesley agreed, that he would on or before the 1st day of February, 1835, well and effectually, either by a charge on freehold estates of inheritance, to be situate in England or Wales, or by an investment of an adequate sum of money in some of the stocks or funds of Great Britain, or by the best means which might then be in his power, secure the payment of an annuity in trust for Mrs. Wellesley. Mr. Wellesley

(*e*) *Lyde v. Mynn*, 4 Sim. 505.

(*f*) See Lord Brougham's Judgment in *Lyde v. Mynn*, 1 M. & K. 695.

(*g*) Per Lord Cottenham arg. in *Lyde v. Mynn*, 1 M. & K. 620. See *Alexander v. the Duke of Wellington*, 2 R. & M. 35.

became entitled to property on the 1st of February, 1835, sufficient to enable him to perform his covenant. The bill was filed against him and the trustees of the property he had on the day named, praying a specific performance of the contract. The trustees demurred to the bill; it was urged in support of the demurrer that this was a mere personal covenant, and that it could not be considered as affecting any specific property; that the plaintiff's right to sustain such a bill as the present, was not at all stronger than the right which a creditor, with the security only of a personal covenant to pay, would have to prevent the debtor from selling his lands.

Lord Cottenham overruled the demurrer: he said, "that this Court will grant a specific performance of an agreement for a grant of an annuity (*h*), cannot now be questioned; and this agreement appears to me to contain within itself all that is necessary to give it legal validity; but if this Court is to execute the agreement, it must do so according to the terms of it. The terms are, on a day certain, to charge the annuity on lands, or on an investment of stock, or by the best means in his power. I think it quite immaterial, for the present purpose, whether this gave to the husband an option, or whether he has other lands besides those vested in these defendants, upon which he can now charge the annuity; because the bill alleges that he refuses to charge it in any manner; and this Court will not permit him, under the pretence of exercising an option, to evade the performance of his contract. In *Deacon v. Smith* (*i*), there

(*h*) See *Pritchard v. Ovey*, 1 J. & W. 396.

(*i*) 3 Atk. 523. See also *Prebble v. Boghurst*, 1 Sw. 309.

was an option; but it did not prevent the Court from acting upon the one alternative. The property acquired, by the arrangement of December, 1834, must be considered as subsequently acquired property; but that contracts to charge property subsequently acquired will be enforced, is sufficiently established. *Lyde v. Mynn* (*j*), and the cases upon which that decision was founded, are conclusive upon that subject. The contract is not to purchase lands for the purposes of the agreement; but one alternative is to charge lands in February, 1835, and at that time he had a power of charging lands. It is the same as a contract to charge such lands as he might have at that time; and if so, such was *Metcalf v. The Archbishop of York* (*k*), and *Lyde v. Mynn*, and such was *Tooke v. Hastings*, as reported in 2 Vern. 97. In *Lewis v. Madocks* (*l*), a contract upon marriage, to settle all personal estate, of which the husband might become possessed during the coverture, was enforced against an estate he had purchased, in part with personal property so acquired" (*m*).

The case of *Lewis v. Madocks* is one of a class, which have occasioned considerable difficulty; those in which there has been a covenant or agreement either to settle all the personal property that a person may acquire during his life, or to leave the whole or a certain proportion of his personal property at his death.

Whilst the custom of London existed in full force,

(*j*) 4 Sim. 505, and 1 M. & K. 683.

(*k*) 1 M. & C. 547; S. C. 6 Sim. 224.

(*l*) 17 Ves. 48.

(*m*) 4 M. & C. 561; see p. 579; see also *Roundell v. Breary*, 2 Vern. 482.

and prior to the statute authorizing freemen to dispose of the whole of their personal estate, it was decided that a freeman had no power as against his children, to assign the personal estate in trust for himself for life, and afterwards to his grandchildren, the deed was looked upon as a fraud upon the custom (n).

In *Jones v. Martin*, Mr. Martin had covenanted that he would at his decease, by his will, give and leave to his daughter a full and equal share with her brother and sister, of all his personal estate; he transferred stock into his son's name, but the son always directed the dividends to be paid to his father during his life; the House of Lords held that this stock was subject to the covenant. Lord Rosslyn, C., said, "this covenant was stated by the counsel for the respondent to be vague and idle, unmeaning and insecure. It is not, however, an unusual covenant in settlements, many marriages are entered into on such covenants; and they are not inexpedient. They are entitled to favourable consideration. Such a covenant holds out a prospect, that the party who marries into a family, shall continue a member of that family; and it provides as it were, a pledge, that he shall be considered, and may consider himself part of such family till the death of the person, who enters into the covenant. But then it does not confine or restrict the father's powers. He may alter the nature of his property from personal to real; or he may give scope to projects; or indulge in a free and unlimited expense. But he must not be allowed to entertain more partial inclinations and dispositions towards one

(n) *Turner v. Jennings*, 2 Vern. 612.

child before another. If his partiality does not rise so high, and he will make a difference, he must do it directly, absolutely, and by an unqualified gift, surrendering all his own right and interest. He must give out and out. He must not, however, exercise his power by an act, which is to take effect, not against his own interest, but only at a time when his own interest will cease." (o).

In *Randall v. Willis*, Randall, covenanted by articles dated the 2nd of October, 1776, that within three months after his marriage, he would convey certain estates to trustees upon certain trusts, "and also all and singular his personal estate of what nature or kind soever." At that time he had considerable personal estate and only the settled real estate; on the 5th of November following, he conveyed the real estate and assigned all the personal estate and effects, of which he was possessed at the time of the execution of the articles, to the uses specified in the articles. He afterwards called in the personal estate and purchased considerable real estate. Upon his death a bill was filed by his widow, to amend the settlement, and to have the value of the personal estate laid out in real estate, or if that was not to be allowed, the value of such of the personal estate as he had at the execution of the articles and also at the time of his death, accounted for. Lord Rosslyn thought that the meaning was, that it is an engagement as to the personal estate at his death, giving the use to him clear and absolute, and the residue at his death to be the subject; and that there ought to have been in the settlement

(o) *Jones v. Martin*, 5 Vcs. 268, note.

a covenant by the husband, that what real estate he should purchase, should be considered as to the objects of the settlement as personal estate. The decree declared that the personal estate which Randall had at the time of the execution of the articles, and which was afterwards laid out in real estate, ought to be subject to the settlement. His Lordship also said, "there was one construction the words obviously cannot bear; that is, a specific settlement of every article of personal estate, that within the period allowed for the settlement he might be possessed of. Personal estate is so fluctuating in its nature, that it is impossible to make every thing, every chair and stool, the provisions in the house, &c., the subject of a settlement" (*p*).

Now this very case occurred subsequently. Madocks, on his marriage, executed a bond, conditioned for his settling all and singular such goods, chattels, personal estate and effects, as he should at any time, during the joint lives of himself and wife become possessed of. He was seised of no real estate at the time of his marriage, and afterwards purchased real estate. His wife claimed this estate under the bond. Lord Eldon decreed, that the personal estate of which the husband was possessed during the coverture, was liable to the bond. He remarked upon *Randall v. Willis*, what must have before struck the learned reader, that, "when it was determined that the property,

(*p*) 5 Ves. 262, see p. 274. In an anonymous case reported in 3 Swanst. 400 (note), it was decided that a gift of the moiety of the donor's goods to be enjoyed after his death, passes those only which

were in specie at the time of the gift; and that if any of them be lost, decayed, or changed, and others bought, and brought in their place, they do not pass in law or equity.

which was laid out in land, was a part of the subject assigned by the settlement, there could be no difficulty in saying, that personal estate at least, must have been called back; as clothed with a trust created by those articles or that settlement. The course of the argument took quite a different turn; viz., that there ought to have been a covenant, that, whatever personal estate should be laid out in land, that land should be considered as personal estate. In the cases upon the custom of London, it is very familiar, for the purpose of avoiding questions, whether personal estate is laid out in land in fraud of the custom, to have an express covenant, that what is laid out in land shall be considered as personal estate, to be disposed of according as the custom and statute law together direct. But that is a case of a different sort from that of *Randall v. Willis*; for the covenant there attaches from time to time upon all he acquires from the marriage to death. But in that case, the personal estate he had at the date of the articles, was expressly made the subject of trusts in the settlement; bound therefore by the settlement; and the question did not at all attach upon the personal estate to be acquired between the date of the settlement and the death of the testator." He then referred to *Jones v. Martin*, and added; "but that case and *Randall v. Willis* do not bear upon this; for this is that case, which in the discussion of *Randall v. Willis* was looked upon as one, that in all probability never would occur: viz., a covenant to settle all the personal estate he should at any time be possessed of: attaching upon each article that he had, and that from time to time he should become possessed of. It is very strong for a Court of Equity to

say, that, because it is difficult to execute the covenant in particular cases that may occur, therefore it shall not be executed. The same objection was there taken; is it to attach upon every chair, table, &c.? That difficulty occurred equally in *Randall v. Willis*; but it was got over thus; that if the Court finds a valid subject of personal property, they would attach it rather than render the covenant perfectly nugatory, though they did not know what to do with the argument shewing the absurdity of it" (q). Inquiries were directed, and the case was again argued on further directions, when it was urged, that the only mode of doing justice was to permit the plaintiff to recover damages at law; the plaintiff, on the other hand, claimed the estate itself. But Lord Eldon did not go so far as that, he said the personal estate bound by this obligation, and which has been laid out in this real estate, is personal property that may be demanded out of the real estate; that the estate is chargeable with it, agreeably to the case of *Lane v. Dighton* (r). He also observed there is no difference between a marriage settlement, attaching upon every chair and table, and [a] direction in a will, that such specific articles shall go as heir-looms (s).

In *Cochran v. Graham*, Lord Eldon said, that if there is a covenant to leave a widow such a portion of the personal estate as she would be entitled to, under the Statute of Distributions, if he had died intestate, the party may spend all his substance, but cannot reserve

(q) *Lewis v. Madocks*, 8 Ves.
150.

(s) *Lewis v. Madocks*, 17 Ves.
48.

(r) *Ambl.* 409.

to himself any part for his own benefit, that is subject to the covenant; and it would follow, that he could not lay it out in land. That his Lordship took to be the result of all the cases (*t*).

It was attempted in a later case, where there was a covenant to leave property equally among the children, to support a settlement by the testator upon himself for life. Sir Wm. Grant, M. R. said, "the spirit of such a covenant requires, that every disposition should be excluded, which is in its effect testamentary, though not such in point of form. The custom of London, like a covenant of this description, attaches only upon the property, which the freeman has at his death. During his life he has full liberty to dispose of his personal property in any manner he thinks fit; yet, it has been held that a disposition by a freeman, that is not to take effect until after his death, though by an irrevocable instrument, is a fraud upon the custom. Thus, in the case of *Bowers v. Fairbeard* (*u*), a judgment acknowledged by a freeman to secure to the mother of illegitimate children, by him, the payment of £500 within three months after his death, was held not to be available against the wife's customary right. So, in *Turner v. Jennings* (*v*), an assignment by a freeman of London by deed of the greatest part of his personal estate in trust for himself for life, and then for his grandchildren, was held a fraud upon the custom" (*w*).

The language of Lord Eldon quoted above, that a

(*t*) 19 Ves. 63; see p. 66.
McDonnell v. McDonnell, 4 D. &
 W. 376.

(*u*) 2 Vern. 202.

(*v*) 2 Vern. 612. 685.

(*w*) *Fortescue v. Hennah*, 19
 Ves. 67; see pp. 72-3.

covenant to leave such a portion of the personal estate as the widow would be entitled to, would prevent the covenantor from laying it out in land: could hardly have been correctly attributed to him. It is inconsistent with the language of Lord Rosslyn, in *Jones v. Martin*, and inconsistent too with the principle upon which all those cases have gone. If the money is laid out in land, with the intention of practising a fraud upon the covenant, then the rule is correct (x). But the simple investment of money in land is no badge of fraud, as the reserving a life interest in personalty is. This always has been a question of circumstances, and as Lord Eldon remarked in the observations we have already quoted from his judgment, in *Lewis v. Madocks*, the best mode of avoiding the difficulty attending an inquiry into the circumstances under which the investment was made, is to insert a covenant that all investments of personalty in land shall be considered as money.

The subject received full investigation in the House of Lords in a recent case: the principle of all the cases we have quoted was affirmed, and the necessity for the gift being out and out to prevent its being in fraud of the covenant was fully insisted on. It happened that Lord Eldon had directed the Master to inquire as to the circumstances under which the real estate had been purchased; and his Lordship said in the House of Lords, that the evidence shewed a case of fraud upon the agreement which the Courts could

(x) It is said that a freeman of London laying out money in land, expressly to avoid the custom, the land was not bound. *Babington v. Greenwood*, 1 P. W. 5, 30; but if

he had covenanted to become a freeman for valuable consideration, Qy.; *Frederick v. Frederick*, 1 P. W. 711.

not permit to be practised; he said the mere laying out the personalty in land would not constitute fraud, but the fraud was in giving the land afterwards, reserving the life interest, whereby, at his death the donee got money through the medium of land; that he might have left it to descend to his heir; but the fraud was in the contrivance to retain the enjoyment, and yet devise it in breach of the covenant. Lord Plunkett spoke to the same effect. "If Daniel Birkett the elder had chosen to convert his entire personal property into real estates, and had left it to descend to his heir-at-law, no person could have found fault with it. The principle of the cases cited by the noble lord [Brougham] applies to this case; for they go the length of establishing this rule, that if he makes a disposition in his lifetime of his personalty, or changes his personalty by purchasing real estates, if that is done for the purpose of evading the performance of the special contract which he had entered into, and enabling him to make a disposition, which is, in effect a testamentary disposition, although it purports to be an act *inter vivos*, that shall not be allowed to be done, and shall be corrected by the established principles of the Court. That being so, his reserving a life interest to himself in the personal property which he transfers, or his reserving to himself a life interest in the real estate which he buys, making that real estate the subject of disposition by virtue of the residuary clause in his will; all this shall be evidence that it is fraudulently done, and for the purpose of defeating the contract which he had entered into" (y).

(y) *Logan v. Wienholt*, 7 Bligh's New Reports, 1, and 1 Cl. & Fin. 611.

This is agreeable to the earliest cases; thus in the case of *Gregor v. Kemp*, Joan Kemp agreed to give to her son, his executors, or administrators, one full fourth part of all the real and personal estate she should be seised of or entitled to at the time of her death. Lord Macclesfield, C., said, that notwithstanding the articles, Mrs. Kemp was not restrained from disposing of her estate any way in her lifetime, and had a full power over it, but with this single exception, (*viz.*): she was restrained from making a distribution on purpose to defeat the covenant, which it is here fully proved she did (*z*).

Sweeping agreements of this sort in marriage settlements, that all property to be acquired during the coverture, shall be settled on the same trusts as the property then settled, are not uncommon, and as to the property of the lady are expedient and desirable (*a*).

Although property be given to the separate use of the lady during coverture, it will still be bound by such a covenant on her part made before marriage, and the clause as to separate use will have no effect (*b*), of course if the husband alone covenants, property given to the wife's separate use, cannot be affected (*c*).

In a late case it was apparently admitted, that an assignment by one of the presumptive next of kin of a lunatic, of all his possible interest in the personal estate of the lunatic, would pass to the assignee, the

(*z*) 3 Swanst. 404 (n.)

(*a*) *Graffey v. Humpage*, 1 B. 46; *Tawney v. Ward*, 1 B. 563; *Needham v. Smith*, 4 Russ. 318; *Willis v. Black*, 4 Russ. 170.

(*b*) *Tawney v. Ward*, 1 B. 563. There was no clause against anti-

cipation.

(*c*) *Travers v. Travers*, 2 Beav. 179; as to whether this covenant includes property then vested, see *Hoare v. Hornby*, 2 Y. & C. N. C. C. 121; *Blythe v. Granville*, 13 Sim. 190.

share, which if living, at the lunatic's death, the assignor would otherwise have had (*d*).

In *Hyde v. White* (*e*), the children of Richard White, entered into an agreement, in their father's lifetime, to divide equally amongst themselves, the property which their father should die possessed of. Sir L. Shadwell, V. C., said, "on the authority of *Wethered v. Wethered* (*f*); and *Harwood v. Tooke* (*g*), I think that the agreement ought to be performed."

So the Court decrees performance of a covenant for further assurance; if any subsequent right accrues to the person entering into that covenant; and more than this, if there is no such covenant, the Court implies an agreement, that any subsequent right acquired by the vendor of an estate, shall be conveyed to the purchaser (*h*).

Sir L. Shadwell said, "I take the law to be this, that if a person has conveyed a defective title, and he afterwards acquires a good title, this Court will make that good title available, to make the conveyance effectual" (*i*).

When a man not having a title at the time agrees to sell, and afterwards such title accrues to him, the Court binds the conscience of the vendor himself, and compels him to make good the title at any future period when he can (*j*).

In *Newmarch v. Brandling*, Lord Eldon held, that

(*d*) *Hinde v. Blake*, 3 B. 234.

(*e*) 5 Sim. 524.

(*f*) 2 Sim. 183.

(*g*) 2 Sim. 192.

(*h*) *Pye v. Daubuz*, 3 Bro. C. C. 595, *Hallett v. Middleton*, 1

Russ. 243.

(*i*) *Noel v. Bewley*, 3 Sim. 103; *Clayton v. Duke of Newcastle*, 2 Ca. in Ch. 112.

(*j*) *Smith v. Baker*, 1 Y. & C., N. C. C. 223.

if a man grants a right of way for a term of years, and afterwards acquires a power to render that grant effectual, neither he nor those claiming under him, can be permitted to defeat it (*k*).

So a man agreeing to sell an estate, and buying in a claim to that estate, will be compelled to perform his agreement. In *Masters v. Cooke*, A. entered into an agreement in writing with C. for the purchase of an estate, if a good title could be made. B. (a stranger) afterwards filed a bill, claiming part of the lands; C. buys in his claim, A. was held entitled to a specific performance of the agreement (*l*).

Perhaps the strongest case on this point is *Moody v. Mathews* (*m*). A feme sole lessee for years of tithes, sold an annuity for life out of the tithes, with a covenant to pay the annuity, and that the tithes should be subject to the annuity during the life of the annuitant: the grantor afterwards surrendered the lease and obtained a new one, married and died, leaving her husband surviving; he took the lease by survivorship, and renewed for a period beyond what his wife's interest would have extended to. Sir W. Grant held, that although he was not bound to renew, except so far as he had assets of his wife, yet standing in the place of his wife and renewing with his own money, the lease was subject to the annuity, and the annuitant was not to pay any of the expenses of renewal (*n*).

In *Morse v. Falkner* (*o*), it was said that the

(*k*) 3 Swanst. 99.

(*l*) *Collis*, P. C. 433.

(*m*) 7 Ves. 174.

(*n*) See *Maxwell v. Ashe*, 7 Ves. 184.

(*o*) 3 Sw. 429 (*n*.)

equity did not extend to the heir, and the Lord Chief Baron said, he was not aware that on a bill filed for a specific performance against the heir of a person who sold without having any title at the time of his bargain, the Court has referred it to the Master to inquire whether the vendor had any title to the premises at the time of his death. But Sir Edward Sugden, in *Averall v. Wade* (*p*), referring to this case said, "there the party was not entitled, at the time of the conveyance, but afterwards acquired the title by descent, and the Court seemed to think there was a personal equity, and not descending with the land. I am not of that opinion" (*q*).

A covenant to settle estates which may descend to the covenantor is therefore not personal, but will be enforced by the Court upon any estate which comes to him (*r*). This was decided by the case of *Wellesley v. Wellesley*, if there had been any doubt about it. In that case the trustees of Mrs. Wellesley demurred to the bill for the specific performance of an agreement by him to grant an annuity. Lord Cottenham said, "If at the hearing, the Court will have no power to make any decree, except that Mr. Wellesley do perform his contract, and has no power to act upon the land, then the demurrer must be allowed; but if the Court can act upon the land, then the defendants who have demurred, and are made defendants, as trustees of the land, are properly made defendants, and the demurrer must be overruled; that is, in that

(*p*) *Ll. & Goold, R. t. Sugden*,
260.

(*q*) See *Bensley v. Burdon*, 2
S. & St. 519; and on appeal, 8 Law

J. Rep. 85.

(*r*) See observations in *Carleton*
v. Leighton, 3 Mer. 672 (*n*.)

case, according to the plaintiff's shewing, she will have a decree against them. If there be a contract for sale, and the vendor proceeds so to deal with the property as to incapacitate himself from performing his contract, this Court will act upon the property, and legislative provisions now exist, enabling this Court in certain cases to exercise this jurisdiction with more effect" (s).

Lord Eldon, in *Boehm v. Wood* (t) said, "if A. B. undertakes to sell another's estate, it does not signify whether A. B. has any interest, provided he can give the estate at the time the purchaser was to have it." This language seems opposed to the doctrine of Sir Edward Sugden, who states the want of mutuality to be a sufficient objection to such an agreement. But there is mutuality of obligation, and the only objection which is valid is that the plaintiff was not a *bonâ fide* contractor (u). In *Chamberlain v. Lee* (v), Sir L. Shadwell, V. C., said if the case is that A., with reference to an estate which he knew to belong to B., contracts to sell it to C., it is a very wholesome rule that this Court ought not to aid such a contract. But this would not apply to property believed by the vendor to belong to him, and in his possession.

The effect of the doctrine established by Courts of Equity as to the specific performance of agreements, is further exemplified by the doctrine of equitable assignment. Lord Cottenham's judgment, in *Burn v. Carvalho* (w), puts this matter in a very clear light.

(s) 4 M. & C. 561; see p. 577.

Purch. 241.

(t) 1 J. & W. 421.

(v) 10 Sim. 444; see p. 450.

(u) Sugden on Vendors and

(w) 4 M. & C. 690; see p. 702.

"In equity, an order given by a debtor to his creditor upon a third person, having funds of the debtor to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund. In *Row v. Dawson* (*x*), Lord Hardwicke says, "It is a credit on the fund, and must amount to an assignment of so much of the debt; and though the law does not admit an assignment of a chose in action, this Court does, and any words will do, no particular words being necessary thereto;" and in *Yates v. Groves* (*y*), Lord Thurlow says, "This is nothing but a direction by a man to pay part of his money to another for a valuable consideration. If he could transfer, he has done it; and it being his own money, he could transfer." In *Ex parte South* (*z*), Lord Eldon says, "It has been decided in bankruptcy, that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shewn to the debtor, it binds him. On the other hand, this doctrine has been brought into doubt by some decision in the Courts of Law, which require that the party receiving the order should, in some way, enter into a contract. That has been the course of their decisions; but is certainly not the doctrine of this Court." In *Fitzgerald v. Stewart* (*a*) and *Lett v. Morris* (*b*), the same rule was acted upon; and, in *Watson v. Duke of Wellington* (*c*), Sir J. Leach thus defines an equitable assignment: "In order to constitute an equitable assignment, there

(*x*) 1 Ves. sen. 331; see p. 332.

(*y*) 1 Ves. jun. 280; see p. 281.

(*z*) 3 Sw. 393.

(*a*) 2 Sim. 333, (see S. C. 2 R. &

M. 457).

(*b*) 4 Sim. 607.

(*c*) 1 R. & M. 602; see p. 605.

must be an engagement to pay out of a particular fund." Upon this principle it is that assignments of future freight and of non-existing, but expected, funds have been enforced in equity; but this case is far within the limits of the funds, for here there is an existing fund in an agent's hand, and there is a distinct contract to discharge the liability out of that fund, and to give directions for that purpose.

It sometimes happens that if there is no right at law, there is none in equity. This is the case where by statute a right is constituted, which otherwise does not exist; or where by statute, a right is declared under certain circumstances to be barred, both at law and in equity. Thus Lord Eldon, alluding to the Registry Acts said, there is no doubt there can be no such thing as the equitable ownership of a ship (*d*).

A question has been raised whether if there be no legal assignment of copyright, an equitable assignee can claim the benefit of his assignment in a Court of Equity.

In *Rundell v. Murray* (*e*), it was alleged that the plaintiff had given the defendant the work in manuscript; the plaintiff applied for an injunction, alleging that there being no assignment in writing, the defendant had no property in the work. Lord Eldon said, "whether Mr. Murray has a right to exclude the plaintiff or any one else from the publication of this work, is a question that I have now nothing to do with:" and afterwards, "It is settled that an assignment of copyright must be in writing, although it frequently

(*d*) *Dixon v. Ewart*, 3 Mer. 333,
see 8 & 9 Vict. c. 89, s. 34; and
Follett v. Delany, 17 Law J. Rep.

N. S. Ch. 254.
(*e*) Jac. 311.

happened that Courts of Equity had granted injunctions at the suit of persons claiming under assignments not in writing, until we were set right by a decision of the Court of King's Bench." This language seems to shew it was his Lordship's opinion, there could be no equitable assignment of copyright. In *Mawman v. Tegg* (*f*), on the application for an injunction, it was urged, that the remedy by injunction being only ancillary to the legal remedy, the party applying for it ought to shew that he has a title, on which he could recover at law; and that the plaintiff not having any assignment in writing, had no valid title in either law or equity. Lord Eldon held that there was a sufficient allegation of title. Two of the plaintiffs were assignees of a bankrupt owner of the copyright; Lord Eldon said, "whatever question there may be in some cases, whether an interest in copyright does or does not pass without writing, it would, I apprehend, be difficult to maintain that there must be an instrument in writing between a bankrupt and his assignees." It is clear that the doctrine was supposed to be that there could be no interest in equity in copyright, unless there was an interest at law.

In *Colburn v. Duncombe* (*g*), this doctrine is placed upon the fact that there was no such thing as copyright at common law, and that therefore, if the forms of the statute respecting copyright are not observed, no interest passes at law or in equity. The defendants had demurred for want of equity, and also because the author was not a party. Sir L. Shadwell, V. C., said, "This suit is manifestly defective in not

(*f*) 2 Russ. 385, see p. 392.

(*g*) 9 Sim. 151.

having the author of the work a party to it, and the demurrer for want of parties must be allowed. But as the bill contains sufficient to shew that the plaintiff has a good title in equity, I shall give him leave to amend his bill without prejudice to the injunction." Accordingly, in *Sweet v. Cater*, it was alleged by the bill that the legal interest in the copyright had never been duly assigned to the plaintiff by the author, who was made a defendant. The other defendant demurred for want of equity, insisting that the language of the Copyright Act, makes it quite clear that no one but the author or the proprietor of the copyright of a book can sue in a case of piracy. But Sir L. Shadwell said that the plaintiff was an assignee of the copyright in a limited sense, and overruled the demurrer, and the author (Sir E. Sugden), declining to permit the plaintiff to bring an action in his name, the defendants were ordered to admit, at the trial, that the plaintiff was the legal proprietor of the copyright (*h*). In *Chappell v. Purday*, it was decided by the Court of Exchequer that the Court would assist an equitable title merely to a copyright (*i*).

These cases seem to remove all doubts upon the question, and to prove that there may be an assignment of a copyright, only valid in equity, and which confers an equitable title on the assignee.

(*h*) 11 Sim. 572.

(*i*) 4 Y. & C. 424.

CHAPTER II.

The benefit of a Contract may be assigned.

It follows from the fact, that the contract gives a right to have it performed in specie by a Court of Equity, that a person who takes a benefit under a contract may assign it; but it has been doubted whether the assignee of a contract can, in his own name, file a bill for specific performance.

It might be thought that not being a party to the contract, he could not specifically enforce it; and that as he is a stranger to the other contracting party, there would be no mutuality. But the act of filing the bill gives the other party the power of filing a bill against him, and would be considered equivalent to a written agreement. In many cases, indeed, part performance of the contract by the assignee has been held sufficient to justify the original contracting party in filing a bill against him; and it is not necessary that the other original contractor should be made a party to the suit (a).

In *Colton v. Wilson*, a testator devised his property to trustees to sell and pay debts, the trustees contracted to sell, and the creditors brought a bill for specific performance against the purchaser; it is not

(a) *Holden v. Hayn*, 1 Mer. 47; *Hall v. Laver*, 4 Y. & C. 216.

stated whether the trustees were parties, no objection seems to have been taken to the form of the suit, and a decree was made (*b*).

But agreements may, from their very nature, involve a personal relation, as in the case of a partnership, and in most agreements, except those for the sale of estates this difficulty arises: it seems to present some obstacles to the assignment of agreements for leases; the question is, whether the personal character and circumstances of the lessee are not a portion of the consideration in the mind of the lessor who agrees to grant a lease to him.

In *Willingham v. Joyce*, Lord Alvanley, M. R. said, "I would not decree a specific performance of a lease of a house, merely to give up the house to assignees" (*c*). Lord Rosslyn, C. said, in a later case, "I cannot say the bankruptcy discharges the contract, as a general proposition, the case you state of a purchase does not discharge the contract. I am to consider whether I can put any terms upon the assignees that shall make them do equity. The assignees might have made an agreement to sell this lease making a profit upon it, to a person to whom there could be no objection. I cannot say now, that they may not have put the case under terms that might oblige me to perform it, supposing it a complete agreement" (*d*).

A case was mentioned where Lord Thurlow, under similar circumstances, executed such an agreement concerning a house on Ludgate Hill, his Lordship said, "the bankruptcy was an assignment, and if the party

(*b*) 3 P. W. 190.
(*c*) 3 Ves. 168.

(*d*) *Brooke v. Hewitt*, 3 Ves.
253.

had made an actual assignment, the assignee would, without doubt, be entitled to a performance, because the lease would be to the party and his assigns" (e).

"There is a distinction," said Lord Eldon, "certainly between a purchase and a lease. In the former instance, the bill for a specific performance tenders payment of the purchase money: the latter is very much otherwise, and the Court ought not to forget the habit of dealing among mankind with regard to the relation of landlord and tenant. Every man taking a tenant looks to the probability of the rent being paid; and that attention is paid to that circumstance through the whole currency of the lease, that introduces a provision not to assign or underlet without license; and that is often thought of so much consequence, that special care is taken at least as to the end of the lease, that there shall then be a responsible tenant, though it may not have been thought necessary to provide for that in the anterior period. A difference of opinion has, I know, prevailed whether that is a usual covenant to be inserted as such or not. But recollecting, that the lessee remains liable to the determination of the term, but an assignee only during his possession, it is of great importance to the lessor to take care, that the lessee shall be a man of substance. Therefore, insolvency admitted and not cleared away, is a weighty objection to a specific performance of an agreement for a lease, the party were seeking an execution beyond the law" (f).

In *Neale v. Mackenzie*, Lord Langdale, M. R. said,

(e) 3 Ves. 256.

(f) *Buckland v. Hall*, 8 Ves. 92, see p. 94.

"I do not say that insolvency would not be a ground upon which the Court would refuse specific performance, but the insolvency must be proved in some satisfactory manner" (g); and in *Price v. Assheton*, where the plaintiff filed a bill for specific performance of an agreement to renew a lease, the Court of Exchequer, being satisfied that the plaintiff was in insolvent circumstances, dismissed the bill, on the ground that the Court would not compel the landlord to take an insolvent person as his lessee (h).

But in the case of a building or improving lease, where a large sum of money has been laid out, with a covenant to renew, the insolvency of the person applying under the covenant is of less importance, if there is a clause of re-entry in the lease (i).

Lord Redesdale said, in *O'Herlihy v. Hedges*, "There is a great deal to be considered with respect to contracts of this kind. Here is a contract for the occupation of land, in which contract the solvency and the character of the tenant are intimately concerned: they are not so important however as if the lease were at rack-rent, there, the solvency and character of the tenant are every thing. Now, suppose a trustee was to contract for a lease at a rack-rent, and that *cestui que trust* filed a bill for a specific performance: says the defendant, 'I agreed with this man as a good tenant, a solvent man, and skilled in the improvement of ground; you are poor, you are ignorant of the cultivation of land: and because he happens to be your trustee, though there is no trust apparent, must I put

(g) 1 Keen. 474.
(h) 1 Y. & C. 441.

(i) *Hyde v. Skinner*, 2 P. W.
197.

upon my estate a tenant who will ruin it?' Can this be equity? I think not. If indeed such a lease had been actually executed, and without containing a provision that the tenant should not assign without license, in such case the landlord must suffer for his folly. The difference in the character of the tenant may make a great difference with respect to the land, and may be an injury to the landlord to an incalculable extent; and, therefore, it would be dangerous to establish merely on the principle, that a trustee shall gain no benefit for himself, that a party not knowing of the trust shall be obliged to execute an agreement made with the trustee. Suppose a farmer in possession of a farm at a rack-rent, holding under an assignment of a lease, and being the apparent owner: he cultivates the land well, and gives satisfaction to his landlord, who, for his encouragement, proposes to give him a further term, and he enters into a contract to that effect: and then the person who assigned the lease starts up and insists that the farmer was his trustee, and, though the landlord knew nothing of such trust, that he must execute a lease to him and not to the tenant. Surely, the landlord has a right to say 'I never would have entered into such a contract with you.' " (j).

This doctrine has not been followed, it is in direct opposition to the doctrine of Lord Thurlow; the rights which the tenant would have under an actually executed lease, a Court of Equity ought to consider he has, upon an agreement for it: one of these rights, is

that of assigning the lease, and a Court of Equity will always perform the agreement, at the instance of an assignee.

In *Weatherall v. Geering*, Sir Wm. Grant decided that an assignee of an agreement to grant a lease to a person who had become bankrupt, when in the lease there was to be a proviso not to assign without license; could not himself, putting the bankruptcy out of the question, have obtained specific performance, after an act which amounted to a forfeiture. Then the assignee of the bankrupt, in bankruptcy, could he enforce a specific performance? The proposition, that the assignee of a bankrupt can compel a landlord specifically to perform an agreement to grant a lease to the bankrupt, has never been determined, the utmost extent of *Brooke v. Hewitt* is, that Lord Rosslyn would not say, it was impossible; acknowledging, that the assignee would have great difficulty to establish it at the hearing. I should think that difficulty insurmountable. But there was no proviso against assignment. What then would the Court say, where there is a proviso against assignment? Would the Court in direct opposition to that proviso execute such a covenant" (k).

These opinions were given before the decision in *Church v. Brown*, that a covenant not to assign without license is not a proper or usual covenant in a lease: this point had in fact been decided the other way by Sir Wm. Grant, but at a conference with Lord Eldon, the rule was settled, that it should not be

inserted as a usual covenant. The reasoning of Lord Eldon upon that point, his position, that the right to assign unless restrained was incident to the estate of the lessee, renders it impossible to hold that it was such a personal contract, that the assignee of the agreement could not compel its execution (*l*).

The question then would only rest upon the covenants which the lessor had stipulated for, these must be entered into by a solvent person. It seems that Lord Thurlow thought the only objection in the case of bankruptcy was, that the covenant of the bankrupt would be of less value; but the assignee ought to enter into all the covenants (*m*).

Accordingly, in *Powell v. Lloyd*, on a bill by the assignees for the specific performance of an agreement for a lease, the Court decreed that the assignees were entitled to a lease, according to the agreement, on personally entering into those covenants which the bankrupt, if solvent, would have been bound to enter into (*n*).

In *Crosbie v. Tooke* (*o*), Sir L. Shadwell, V. C., on the ground of the insolvency of the party who originally agreed to take the lease, refused to grant a specific performance of the agreement to his assignee. Lord Brougham reversed this decision, and said, "I am clearly of opinion, that the circumstance of the party who originally contracted having assigned his interest cannot be taken into consideration, provided (which is the fact here), the assignee be admitted to

(*l*) 15 Ves. 258.

(*m*) 3 Ves. 256.

(*n*) 1 Y. & J. 427; 2 Y. & J.

372; *De Minckwitz v. Udney*, 16 Ves. 466.

(*o*) 1 M. & K. 431; see p. 433.

be a person in solvent circumstances, and able to enter into the covenants in the proposed lease, and that the insolvency of the assignor cannot be set up with effect for the purpose of releasing the defendant from the specific performance of his agreement. That doctrine, which seems to have been approved by Lord Loughborough, in *Brooke v. Hewitt* has been since fully recognised and adopted in *Powell v. Lloyd*; and the case of *Weatherall v. Geering* is no authority against the general principle, for the agreement there was for a lease which should contain a covenant not to assign. It may further be observed, that, even in cases where alienation without license is expressly prohibited and guarded by a clause of forfeiture, such a clause has been held to furnish no protection against an assignment of the lease by operation of law, under a commission of bankrupt for example, or upon an execution for debt. *Doe dem Mitchinson v. Carter* (*p*); *Lord Stanhope v. Skeggs* (*q*). In *Morgan v. Rhodes* (*r*), his Lordship observed, that of the point in *Crosbie v. Tooke* he entertained not the least doubt, and never did.

Sir James Knight Bruce, V. C. observed, in *Dowell v. Dew* (*s*), that the landlord can hardly be compelled to grant the lease to the assignee, without the personal responsibility of the original lessee for which he contracted, and though the assignee may be entitled to have a lease granted to himself, yet he will not be so entitled without giving to the landlord, if the land-

(*p*) 8 T. R. 57. 300.
(*q*) 8 T. R. 59.

(*r*) 1 M. & K. 435, see p. 438.
(*s*) 1 Y. & C., N. C. C. 350.

lord shall require it, the personal liability of the original lessee for the covenants; and his Honor also said, that the principle of those cases (the cases we have cited) is, that the assignment still leaves the original lessee liable on his covenant. This seems hardly consistent with those cases; they decide that the original lessee may assign his agreement, provided a solvent person enters into the covenants. The landlord has no right to have two sets of covenants, all he has a right to, is to have a covenant from a solvent person; if the other rule obtained, the assignee of a bankrupt would be in a better position than the assignee of a solvent person, as he would not be required to get the bankrupt to join in the covenants; this is a part of the old objection and the old doctrine, but it is inconsistent with later decisions; there is no *delectus personæ* in the matter, unless it is expressly stipulated for. His Honor's judgment was expressly given with respect to the peculiar circumstances of the case decided, and therefore may be considered as not attempting to impugn the general rule.

Policies of insurance against fire are not in their nature assignable, for they are only contracts to make good the loss which the contracting party himself may sustain. Such policies are only special agreements with the persons insuring, against such loss or damage as they may sustain (*t*). Lord Hardwicke was of opinion that it is necessary the party insured should have an interest or property at the time of insuring, and at the time the fire happens (*u*), so that

(*t*) *Lynch v. Dalzell*, 3 B. P. C. 497; as to insurances upon lives; *Godsall v. Boldero*, 9 East, 72;

Halford v. Kymer, 10 B. & Cr. 724.
(*u*) *Saddlers' Company v. Badcock*, 2 Atk. 554.

an assignment could have no effect in equity, as the assignee could not recover in the name of the assignor at law. In the case of a policy of insurance upon a life, if the policy was good at the time of its being made, and if at the time of the life dropping, it is in the hands of a purchaser for valuable consideration, he can recover in the name of the original holder (v).

(v) *Ashley v. Ashley*, 3 Sim. 149.

CHAPTER III.

Notice of the Contract binds all persons claiming under the contracting Parties.

It also follows from the doctrine that contracts ought to be performed, that an assignee of property respecting which a contract is entered into, is bound by such contract if he has notice of it. In *Meux v. Maltby* a bill had been filed for the specific performance of an agreement to grant a lease; pending the suit, a joint stock company bought the land. Sir Wm. Grant said, the pending suit was notice, and that the company were as much bound by the contract as the original defendants; and although he felt a difficulty in decreeing the execution of a lease, he declared the plaintiffs entitled to it, and restrained the defendants from bringing any action to disturb the plaintiffs in their possession (a).

This was the early doctrine of the Court. Lord Keeper Bridgman, in 1668 laid it down. "If a man contracts to purchase lands belonging to a manor of the lord thereof for a certain sum of money, and afterwards the lord offers to sell to him the whole manor, if they do not agree, so that the lord sells all the manor to another, yet upon application to this

(a) 1 Sw. 287.

Court, the first purchaser shall have his contract decreed to him" (b).

This is merely the general principle of equity as to trusts. Lord Redesdale says, "Trusts are enforced, not only against those persons who rightfully are possessed of the trust property as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust; and whoever so comes into possession is considered as bound with respect to that special property, to the execution of the trust" (c).

The most important application of this principle is that relating to the doctrine of covenants running with the land. The technical rules which prevail at law on this subject are disregarded in equity: and the fact that a purchaser of the land had notice of the covenant entered into by the party from whom he claims, has been held sufficient to justify a Court of Equity in enforcing the covenant. This was in effect decided by Sir John Leach, V. C. in the great case of the Duke of Bedford *v.* the Trustees of the British Museum. In 1675, Mr. Montagu covenanted with Lady Russell not to erect certain buildings on his land, so as to interfere with the enjoyment of Lady Russell's property. The property of Mr. Montagu afterwards became vested in the trustees of the British Museum, and that of Lady Russell in the Duke of Bedford. On a bill filed to restrain the building by the trustees contrary to the covenant of Mr. Montagu, Sir John Leach, V. C. ordered a case for a Court of Law,

(b) *Prax. Cancell.* 524; see *Potter v. Sanders*, 6 Hare, 1.

(c) *Crofton v. Ormsby*, 1 S. & L. 362.

directing it to be stated, that the covenant in 1675 was made not with Lady Russell, who had not then the legal estate in the land, but with the trustees. It is clear that he thought the equitable remedy might exist where there was no legal remedy (*d*).

This point was afterwards abandoned; but the observations of Sir Thomas Plumer, M. R. respecting it, are well worthy of attention. "If this were a case," said his Honor, "in which the plaintiff had not a legal, but had only an equitable remedy, as was attempted to be argued by his counsel, on the assumption that, by reason of certain technical forms, he was debarred from obtaining any redress at law; if the case was reduced to that point, it would become extremely material to consider whether the party had any claim at all to come into a Court of Equity for its equitable assistance" (*e*).

Sir John Leach had previously impliedly sanctioned the opinion, that if a covenant to produce title deeds, did not run with the land, yet if the holder of the land and the deeds had notice of the covenant he would be bound (*f*). This is stated to be the law by Sir E. Sugden in his work on Vendors (*g*).

Indeed, the language of Lord Hardwicke in *Furnival v. Crew*, goes to support the remedy in equity; he thought there might be an action at law upon a covenant to renew against the heir-at-law or executor of the covenantor, but he said it was a proper case for relief in equity, from the condition of the person who

(*d*) 2 M. & K. 557.

(*e*) 2 M. & K. 570.

(*f*) *Barclay v. Raine*, 1 S. & St.

449.

(*g*) V. & P., p. 474.

is called upon to renew. It was a covenant which binds the land in a Court of Equity, and, therefore, gives the relief against the proper person who is in possession of the land, as it has a lien upon it (*h*).

This doctrine, however, has not met with the sanction of one distinguished Judge. In the great case of *Keppell v. Bailey*, Lord Brougham, C., first decided that the covenant did not run with the land at law. He then said, "If such would be the construction at law, does the notice which the purchaser had of its existence, alter the case in this Court, upon an application for an injunction; or would it, upon the application of a co-relative and co-extensive nature, for a specific performance? Certainly not. The knowledge by an assignee of an estate that his assignor had assumed to bind others than the law authorizes him to affect by his contracts—had attempted to create a real burthen upon property, which is inconsistent with the nature of that property, and unknown to the principles of the law, cannot bind such assignee by affecting his conscience. If it did, then the illegality would be of no consequence; and, however wild the attempt might be to create new kinds of holding and new species of estate, and however repugnant such devices might be to the rules of law, they would prove perfectly successful in the result, because equity would enable their authors to prevail; nay, not only to compass their object, but to obtain a great deal more than they could at law, were their contrivances ever so accordant with strict legal principle. This Court

(A) 3 Atk. 83.

would be occupied in compelling persons by way of injunction and decrees to perform covenants, which the law repudiated, and for the breach of which no damages could ever be recovered. A case like this bears no analogy to the ordinary case of a purchase, with notice of a prior agreement by the vendor, to sell the premises to another. Such a purchaser has done an unconscientious act, or at least made himself accessory to the unconscientious act of his vendor, in selling another man's property, and therefore his bargain cannot protect him against the prior claim; but that of which he there had notice, was the legal and valid act of the vendor; whereas that of which the assignees here had notice, was their assignor's covenant affecting to bind the land, on which, by law, it could not operate. Observe how this would apply to all assignments of leaseholds. Every assignee of a lease has notice of the lessor's covenants: consequently no covenant, how absurd soever, could be made by a lessee, that would not of necessity run with the land in equity: into whose hands soever the land might come; and all the decisions that have been made by the Courts, with respect to such covenants being collateral or in gross, would be of no avail, because, though no damages could be recovered for the breach of them, yet the performance of them could be enforced against every assignee of the term, as a party necessarily fixed with notice. So a person who had conveyed land, and subjected it to covenants in the hands of his vendee, could at once make sure of those burthens following it into the hands of all holders to whom it might pass, by taking the precaution of

notifying the covenants in some effective, though easy manner, as by publication in some place near the premises, where the purchaser must needs observe the announcement. This Court will never interfere, by way of injunction, or in any other more direct manner, to enforce such covenants, when satisfied that they could receive no support or countenance at law" (i).

In the case of *Lucas v. Comerford*, Lord Thurlow thought that the holder of a lease by equitable assignment who was in possession, was liable to the covenants in the lease: the covenant being to rebuild, the Court could not compel a specific performance, and as a Court of Equity could not give damages for a breach of covenant, he directed a legal assignment to be made so as to make the equitable assignee liable on the covenant at law (j). This was supposed to extend to a mere depositary of a lease, but the taking possession was a necessary ingredient in the case, and led to the decision (k); however the principle that the Court would specifically perform covenants, on which the parties could not be sued at law from their not running with the land, was clearly admitted, by Lord Thurlow's decision (l).

The doctrine of Lord Brougham has not been acceded to by succeeding Judges. In *Whatman v. Gibson*, the Vice Chancellor of England held, that as all the parties who executed the deed were bound by

(i) 2 M. & K. 548; see *Hemingway v. Fernandes*, 13 Sim. 228.

(j) 3 Bro. C. C. 166, 1 Ves. Jun. 235, 8 Sim. 499.

(k) See *Sanders v. Benson*, 4 Beav. 350.

(l) *Flight v. Bentley*, 7 Sim. 149; *Moore v. Choat*, 8 Sim. 508; see *Riddell v. Riddell*, 7 Sim. 529; and *Willson v. Leonard*, 3 B. 373; *Robinson v. Rosher*, 1 Y. & C. N. C. C. 7; *Goddard v. Keate*, 1 Vern. 87.

it; and the only question was, whether there being an agreement, all persons who come in as devisees or assignees, under those who took with notice of the deed, are not bound by it. "I see no reason," said his Honor, "why such an agreement should not be binding in equity on the parties so coming in with notice. Whatever may be the form of the covenant, or whatever difficulty there may be in bringing an action on it, I think that there is a plain agreement which a Court of Equity ought to enforce" (*m*).

The covenants thus enforced are only those which would be binding on the person making them: if they are according to the notions of Courts of Equity, capable of specific performance, specific performance will be decreed; but if specific performance cannot be decreed, a Court of Equity will, if it can, put the parties in a condition to recover damages at law.

In the case in which this can be done, the same discretion will be exercised as in the case of an ordinary agreement. But if the matter is incapable of being decided by the Courts of Law, the Courts of Equity must decide on the matter entirely, as no relief can otherwise be obtained.

In *Bristow v. Wood*, an objection was taken to the title of a piece of land, on the ground that the vendor had covenanted on a previous sale not to build houses of less than a stipulated value on the land. The defendant had no notice of the covenant when he signed the contract; the Vice Chancellor Knight Bruce was of opinion that the question which had

(*m*) *Whatman v. Gibson*, 9 Sim. 196; see also *Schreiber v. Creed*, 10 Sim. 9.

been raised by the exception, was of too doubtful a nature to justify the Court in compelling the purchaser to accept the title (*n*).

In fact the whole doctrine of equitable notice is involved in these discussions. If there is an agreement for valuable consideration, notice of that agreement binds an assignee of the party making it, as much as the person from whom he claims the estate; the equitable right which arises from the doctrine of specific performance cannot be barred in a Court of Equity by any thing but an equitable bar.

In the case of *Page v. Broom*, parties having an equitable estate only agreed to grant a lease, which was to contain special covenants on the part of the lessors; a specific performance had been directed in a suit instituted against a bankrupt's assignees and heir-at-law claiming under the lessors; the Court directed these parties to enter into the special covenants mentioned in the agreement: such covenants, however, to be limited to the beneficial interest they had in the premises (*o*).

The effect given upon this principle to covenants in equity is very important. If there be a settlement of part of the estate, and a covenant that this is free from incumbrances, equity will throw the whole on the unsettled part, which still belongs to the original owner. The equity binds the land in the hands of every person, unless a purchaser for valuable consideration without notice (*p*), the same effect is given to this covenant, as if there had been a covenant

(*n*) 1 Collyer, 480.
(*o*) 3 Beav. 36.

(*p*) *Averall v. Wade, Lloyd & Goold*, Cas. temp. Sugd. 253.

expressly to discharge the settled or sold part. In an early case, this express covenant was enforced in equity. There was a sale of fourteen shares out of thirty-six in the New River Company, which thirty-six were charged; in the agreement for sale the vendor covenanted to discharge the fourteen shares. The Court decreed that the plaintiff should enjoy the fourteen shares discharged, and that the other twenty-two shares should be subject to the plaintiff's indemnity therein; notwithstanding it was insisted that the covenant was merely personal (*q*).

(*q*) *Lord Coventry v. Middleton*, Chan. Cas. 208.

CHAPTER IV.

The Contract only affects those claiming under the Contracting Parties.

AN agreement is only considered equivalent to an actual conveyance between the parties themselves and their representatives; not as to third parties; an agreement to purchase an equity of redemption will not enable the party agreeing to file a bill for redemption against the mortgagee: this was decided by Lord Cottenham, in *Tasker v. Small*. There, in reference to Mr. Phillips being a party to the suit, his Lordship said, "Phillips is merely a mortgagee, against whom no bill can properly be filed, except for the purpose of redeeming his mortgage, and that by a party entitled to redeem. This bill does not pray any redemption of Phillips' mortgage, and if it had, the plaintiff would not be entitled to file such a bill. He is only connected with the property by having contracted to purchase the equity of redemption, and until that purchase is completed, he cannot redeem the mortgage." And again, as to Mrs. Small, another person interested in the estate being a party, his Lordship said, "it was agreed at the Bar that the plaintiff was in equity invested with all the rights of Mrs. Small, upon the principle, that by a contract of purchase, the purchaser becomes in equity the owner

of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interest of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property" (a).

It would seem that upon principle, those who have a legal right ought not to be barred of it, by any other than a legal act; unless they take their legal right from a person whose conscience was bound; but in the case of powers over estates, a different rule has prevailed and the same doctrine has been applied to the case of a husband attempting by an equitable assignment only to bar the wife's title to her chattels real and choses in action by survivorship, the question which has occupied the attention of the Court most, being, whether a husband could effectually assign his wife's choses in action.

The principles admitted are, that a husband has a right to his wife's choses in action, provided he reduces them into possession; and that he has a right to the chattels real, provided he assigns them.

Sir Thomas Plumer, in *Hornsby v. Lee* (b), held that an assignment of a reversionary interest would not bar the wife surviving, and in *Purdew v. Jackson* (c), he said that all assignments made by the husband of the wife's outstanding personal chattels, which is not nor cannot be then reduced into possession, pass

(a) *Tasker v. Small*, 3 M. & C. 68, see p. 71.

(b) 2 Mad. 16.

(c) 1 Russ. 1.

only the interest which the husband has, subject to the wife's legal rights of survivorship.

This doctrine was narrowed by Lord Lyndhurst, C., in *Honner v. Morton* (d). He said, "when the husband assigns the chose in action of his wife, one would suppose, on the first impression, that the assignee would not be in a better situation than the assignor, and that he, too, must take some steps to reduce the subject into possession, in order to make the title good against the wife surviving. But equity considers the assignment by the husband as amounting to an agreement, that he will reduce the property into possession; it likewise considers what a party agrees to do, as actually one: and, therefore, where the husband has the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession. On the other hand, I should also infer, that, where the husband has not the power of reducing the chose in action into possession, his assignment does not transfer the property, till, by subsequent events, he comes into the situation of being able to reduce the property into possession; and then his previous assignment will operate on his actual situation, and the property will be transferred." This distinction of Lord Lyndhurst's has not been maintained; an assignment of the wife's choses in action, so far as it operates as an agreement has no effect against the wife, and Sir Thomas Plumer's language, in all its generality, has been supported. It must be admitted that this is against the authority of Lord Hardwicke,

(d) 3 Russ. 65, see p. 69.

for he certainly, in *Bush v. Dalway* (e), put the right of the husband to the death of the father during the husband's lifetime, and then considered the wife as bound by the covenant to reduce the chose in action into possession.

In *Elwin v. Williams* (f), Sir L. Shadwell, V. C., said, that there was no case deciding that where the husband has for valuable consideration assigned the wife's chose in action, capable of being reduced into possession, and the husband has died without reducing it into possession, this Court has held the wife bound by the assignment. He referred to the question having been asked as to the existence of such a case by Sir T. Plumer, M. R., in *Purdew v. Jackson*, where the Master of the Rolls added, "Suppose that in such a case the assignee were to claim the chose in action, in whose name would he make the claim, and in what form would he bring the action." The Vice Chancellor concluded his judgment by saying, "Lord King appeared to be of opinion, that if the wife's chose in action was not reduced into possession during the husband's life, it survived to her, as against his assignee. It is useless to be always travelling over the same ground. I consider the principle laid down by Sir Thomas Plumer, and twice affirmed by the Lord Chancellor, to be decisive of the present question, whether the husband dies in the lifetime of the tenant for life, whereby the chose in action cannot as against the wife be reduced into the possession, or whether he survives and dies before it is reduced into possession, the same result must in my opinion follow;" and

(e) 9 Mod. 102; 1 Ves. Sen. 19; 3 Atk. 530.

(f) 12 Law Journal Reports, N. S. Ch. 440, 13 Sim. 309.

in *Ashby v. Ashby* (*g*), Sir J. L. Knight Bruce, V. C. said, "the case of *Elwin v. Williams* warrants me in acting on my own opinion, which agrees with the decision in that case; and finding that case before me, without giving any opinion upon other cases, I follow it."

These decisions appear to be acquiesced in by the Profession: and it is clear, that in this particular case equity does not consider what is agreed to be done as done; and that the reasoning of Lord Lyndhurst does not apply. The true principle is, that there is no equity against the wife: the contract is good as to the husband, raising a trust against him, and all who claim through him; but the wife's right is not derived through him, and cannot be affected by his contract.

Upon principle then, how can anything but an actual assignment of the chattels real of the wife bar her right surviving him, if he merely agrees to assign them, can a Court of Equity compel the wife to permit her name to be used in legal proceedings? where is the equity against the wife?

A different doctrine however has been asserted. Mr. Roper puts the power of the husband at law to assign his wife's terms for years, and his power to do the same in equity in analogy to the legal right, upon the same footing; nor is there wanting some shew of authority for the proposition (*h*).

Lord Hardwicke, in *Bates v. Dandy*, said, "It has been insisted by the defendant, that no actual assignment has been made, but that will not make any difference, neither in respect to the administration of

(*g*) 8 Jurist, 1159, 1 Coll. C. C. 549.

(*h*) 1 Roper, Husband and Wife, p. 175.

the husband, nor the surviving wife; for if the husband had a right and power in the consideration of this Court, to have assigned the interest which belonged to the wife, and if he has, for a valuable consideration, undertaken to assign it, that will amount to the same thing in this Court, as if he had so done." He then cites the case of *Coventry v. Coventry* as to tenant for life and remainder-man (i).

In *Druce v. Denison* (j), the question was discussed before Lord Eldon. It was urged on behalf of the wife, that that which is intended to be done, is not to be considered as done between husband and wife under these circumstances; for that there must be some equitable circumstances, making it incumbent upon the person claiming the property to give effect to the intention. No case had occurred between husband and wife upon the intention to reduce her chose in action into possession. The principle is, that the husband has a right to dispose of the chattel real of his wife, and to reduce her chose in action into possession: but he must do the act; he must assign, contract will not do. The case of a lease and the remainder-man was referred to. Lord Eldon said, "I wish that a search should be made upon the point, whether it ever has been decided, that an agreement will, or will not bind the wife; and if it will, whether the rent is to be paid to her or the husband. If that is untouched by decision, I think it will be found, the analogy to other cases will make out that an assignment in equity is to this purpose as good as an assignment at law. But I say, that without prejudice. The principle is stated,

(i) 1 Russ. 33 (n.); 3 Russ. 72 (n.)

(j) 6 Ves. 385.

without saying anything as to the authority of the case, towards the conclusion of *Steed v. Creagh*" (*k*).

But the principle established by the latest decisions is opposed to this. In a recent case the Vice Chancellor Knight Bruce, asked, "Suppose that the husband, living the wife, contracts to sell the wife's term, and dies, is the estate bound?" His Honor was referred to these cases as authorities that it is; but the case before him did not call for a decision of this point (*l*).

Then again, a release of a bond or promissory note is held to bind the wife, and this was extended to an annuity belonging to the wife which was secured by bond, on the ground that if the security is released, there is an end to the annuity (*m*), but can it be held, that in such a case, a mere agreement to release will bind the wife? In all these cases it may be doubted, whether anything will suffice to bar the wife, but that which will bar her at law (*n*).

The point as to powers seems fully established, but on examination we shall find that it depends upon the peculiar doctrines of Courts of Equity as to the nature of powers (*o*).

Powers were originally directions binding the conscience of the trustee of the legal estate: by the aid

(*k*) 9 Mod. 42. This case it was stated at the Bar, was not to be found in the Register's Book, nor have I been able to discover it.

(*l*) *Clark v. Burgh*, 2 Coll. 226.

(*m*) *Hore v. Becher*, 12 Sim. 465. There is some difficulty in following this reasoning: besides the bond, there was an assignment of a policy of assurance in trust, to secure the due payment of the annuity. Sir L. Shadwell said, the release by mistake extended to the proceeds

of this policy, and therefore declared they were subject to the trusts; but the release of the husband could not have barred the trust for the wife surviving. *Stiffe v. Everitt*, 1 M. & C. 37; see *V. C. Knight Bruce*, in *Ashby v. Ashby*, 8 Jur. 1159.

(*n*) *Medcalfe v. Ives*, 1 Atk. 64; but see *Donne v. Hart*, 2 R. & M. 360.

(*o*) See a note to *Mr. Swanston's Reports*, vol. 1, p. 357.

of Courts of Equity alone, powers were enforced; the Statute of Uses enabled powers to convey legal estates; it might have been thought that whatever would have been before the Statute of Uses, a good execution of the power in equity, would after the statute be deemed a good extension of the power at law; but this was not the case: Courts of Law construed powers strictly and required a literal execution of them (*p*).

But the Courts of Equity did not give up their ancient jurisdiction, they construed powers as a reservation of so much of the ancient dominion of the estate, to be under the control of the tenant for life; they said the power was exercised by him in virtue of his life estate; it is a power derived from the fee, and only entrusted to the tenant for life by the owner of the fee: to the extent of granting the estate, allowed by the power, the tenant for life is the owner of the fee, and the persons claiming the fee, are subject to his dominion.

It followed that an expression of intention to exercise the power, whether in the form of a defective execution, or an undertaking to do so, was long ago and early held a sufficient execution of a power in equity. The books on the subject of powers supply abundant instances of the application of the principle (*q*).

The application of the principle has, indeed, been subject to severe criticism; we have already pointed

(*p*) Sugden on Powers, 6th Ed. 2.94; Shannon v. Bradstreet, 1 Sch. & Lef. 52. In Zouch v. Wolston, 2 Burr. 1147, Lord Mansfield held that whatever is an equitable, ought to be deemed a legal execution of a power; and for this rea-

son, "that powers were originally in their nature equitable, but are by the Statute of Uses transferred to common law;" see Cockerell v. Cholmley, 1 Clark & Fin. 60.

(*q*) Sugden on Powers, *ubi sup*.

out the difficulty in holding the distinction between aiding a defective execution of powers in favour of creditors and volunteers. Lord Eldon thought an attempt to execute a power is no more than an intimation, that the party means to execute it; but, if all the requisite ceremonies have not been complied with, it cannot be supposed, that the intention continued until his death (r).

Again, the principle has been stated to be that it was the intention of the party creating the power that any intention on the part of the devisee of the power should be carried into execution; otherwise to allow any thing but an actual execution to be an execution of the power is a fraud upon the author of the power. It would follow that any objects of the power in whose behalf the intention was manifested should have the benefit(s); but then the object is only to be attained through the medium of a Court of Equity, and a Court of Equity will not move on behalf of a volunteer.

A Court of Equity only looks to such an intention on the part of the tenant for life, as it would have enforced against himself (t), and it is impossible upon principle, to avoid admitting, that in this respect equity has from the earliest time interfered, to give in effect a specific performance on behalf of a person

(r) *Finch v. Finch*, 15 Ves. 43.

(s) *Holmes v. Coghill*, 7 Ves. 499, see p. 506.

(t) Equity has not allowed an agreement by a tenant for life for a lease, which is merely parol, but which if he had been seised in fee would have been binding on account of part performance, to affect

the remainder-man. *Blore v. Sutton*, 2 Mer. 237; but see *Butler v. Powis*, 2 Coll. 161. Unless where the remainder-man can be proved to have had any knowledge of the part performance; see the case of *Lord Bolingbroke*, mentioned by Lord Redesdale, in 1 Sch. & Lef. 19 (n.)

from whom no valuable, but only a meritorious consideration moved. Undoubtedly in earlier times, such a consideration would have availed to secure a specific performance of a contract: that doctrine is now rightly abandoned. But the case of supplying a defective execution of a power in favour of meritorious appointees, stands out as glaringly inconsistent with the general rule (*u*).

We see then that in the case of powers Courts of Equity admit the existence of the rule that agreements only affect those who claim under the parties making them, and endeavour to bring the performance of agreements to execute powers within its limits, whilst in the case of husband and wife, the sounder practice of later Judges has corrected the earlier decisions.

An agreement to levy a fine or suffer a recovery, was of no force, unless the fine was actually levied, although for a time thought to be effectual against an equitable entail (*v*), or the recovery suffered: and the statute for the abolition of fines and recoveries exclude the jurisdiction of equity from supplying defects in the powers of disposition given by the act to tenants in tail (*w*).

The right of the widow of a copyholder arising out of his estate, which is in his power during his life, may be barred by him by any act done for valuable consideration, whether conveying a legal estate or

(*u*) *Vide supra*, Book I. ch. 4.

(*v*) See Madd. Prin. & Pr. in Eq. 478, where it is absolutely laid down that a covenant relating to an entail in equity binds the heir.

(*w*) 3 & 4 Wm. 4, c. 74, s. 47. Sugden, V. & P. 228. But a judgment against tenant in tail binds the heir, 1 & 2 Vict. c. 110, s. 13.

otherwise. It is very different from an estate-tail, with remainders over; for those estates are not in the power of the party, till the recovery is suffered. They are estates not arising out of the estate of the tenant in tail. In the case of *Browne v. Raindle*, after this observation, Lord Alvanley said, "Upon the evidence, supposing this a widow's estate arising out of an estate, of which the husband was complete owner, and could bar her estate, I am of opinion, it is that sort of estate, which any equitable conveyance will bind. Any act of the husband for valuable consideration, bars her equally with a legal surrender; and she is compellable in equity to surrender pursuant to such contracts. A covenant by a joint-tenant to sell, though it does not sever the joint-tenancy at law, will in equity. I have always understood this as a settled point, and have no difficulty upon it" (x).

Lord Thurlow, in *Frewen v. Relfe* (y), expressly said, "that a note will work the severance of a joint-tenancy, because it may be severed by any contract;" and he adds: "if the defendants said in their answer that they agreed to do so, I should construe them to have done an act sufficient to sever." "This shews," said Lord Brougham, C., in *Gould v. Kemp*, "that the bare agreement has the force of actual severance, and that the severance is held to be executed, though there exists only an agreement which is as yet unperformed." Accordingly in that case, he held, that a letter from A. to B., in which A. engages to secure to B.'s family, in any way B. may desire by his will, a moiety of a

(x) *Brown v. Raindle*, 3 Ves. 256. (y) 2 Bro. C. C. 220.

fund, in which A. and B. were interested, as joint-tenants, was a severance of the joint-tenancy (z).

It appears that equitable estates-tail were barred by deed, according to the old practice of the Court, down to the time of Lord Guildford. He considered a recovery necessary; and that practice has always prevailed, although some Judges have objected to it (a).

Agreements to execute powers and contracts respecting their execution by the donee, will not be enforced, unless strictly equitable; the same doctrines are applied to specific performance of these, as of any other agreement (b).

(z) 2 M. & K. 304; but as to a lease by a joint tenant, see Bac. Abr. Leases, I. 5, vol. iv. p. 131.

(a) Per Lord Rosslyn, C.,

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(b) Bradbury v. Hunter, 3 Ves. 187. 260.

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